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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 332. 85

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

T. K. KEARNEY AND J. W. WYSE, COMPOSING THE PARTNERSHIP FIRM OF KEARNEY AND WYSE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JUNE 26, 1899.

(17,447.)

10540

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, A. D. 1898, of said court, begun and held at the city of St. Louis on the first Monday in December, to wit, the fifth day of December, A. D. 1898, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the twenty-second day of August, A. D. 1898, a transcript of record, pursuant to a writ of error directed to the United States court of appeals in the Indian Territory, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case of The Liverpool and London and Globe Insurance Company, plaintiff in error, *vs.* T. K. Kearney and J. W. Wyse, composing the partnership firm of Kearney and Wyse; which said transcript of record is in the words and figures following:

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the United States court of appeals for the Indian Territory, Greeting:

Because, in the records and proceedings, and also in the rendition of a judgment of a plea which was in said United States court of appeals before you at the June term, 1898, thereof, between The Liverpool & London & Globe Insurance Company, appellant, therein, and Kearney & Wyse, a firm composed of T. K. Kearney and J. W. Wyse, appellees therein, a manifest error has happened to the great damage of the said Liverpool & London & Globe Insurance Company, as by their complaint and petition for writ of error appears, we being willing that error, if any has happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment therein be given that then under your seal *directly* and openly you send the records and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with writ, so that you have the said records and proceedings aforesaid at the city of St. Louis and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit on or before the 23rd day of September, 1898, to the end that the records and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States (*court*) should be done.

Witness the Honorable Melville W. Fuller, Chief Justice Supreme Court of the United States, this the 25th day of July, A. D. 1898,

and the 112 year of our Independence. Issued at the office of the clerk of the United States court of appeals for the Indian Territory with the seal of the clerk of said court and dated as aforesaid.

WM. P. FREEMAN,
Clerk U. S. Court Appeals for Indian Territory.

Allowed by W. H. H. Clayton, one of the judges of the United States court of appeals.

WM. H. H. CLAYTON,
Judge U. S. Court of Appeals for Indian Territory.

2 In obedience to the command of the within writ I hereby transmit to the United States circuit court of appeals of the eighth circuit a transcript of the records and proceedings in the within-entitled cause, together with all things concerning the same.

Seal United States Court of Appeals in the Indian Territory.

In witness whereof I hereby subscribe my name and affix the seal of the United States court of appeals for the Indian Territory.

WM. P. FREEMAN,
Clerk U. S. Court of Appeals for the Indian Territory.

United States of America to T. K. Kearney and J. W. Wyse, composing the partnership firm of Kearney & Wyse, or their attorneys of record, Johnson, Cruce & Cruce, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Mo., sixty days from and after this notice bears date, pursuant to a writ of error filed in the office of the clerk of the United States court of appeals for the Indian Territory at South McAlester in a case wherein The Liverpool & London & Globe Insurance Company was appellant and Kearney & Wyse appellees, to show cause if any there be why the judgments, orders and decrees against the said appellant, The Liverpool & London & Globe Insurance Company should not be corrected and why speedy justice should not be done in that behalf.

Witness Honorable W. H. H. Clayton, judge of the United States court of appeals in the Indian Territory this 25 day of July, 1898.

WM. H. H. CLAYTON,
Associate Justice U. S. Court of Appeals in the Indian Territory.

I certify that I served the within writ of error by delivering a true copy of the same to T. K. Kearney, one of the defendants herein, and by delivering a true copy thereof to W. B. Johnson, one of the attorneys of record of the said Kearney & Wyse, the said J. W. Wyse being absent from the Indian Territory, this the 3rd day of Aug., 1898.

JOHN S. HAMNER,
U. S. Marshal.

292. Liverpool & London & Globe Ins. Co. *vs.* Kearney & Wyse. Citation in error.

Liverpool & London & Globe Ins. Co. *vs.* Kearney & Wyse. Writ of error and return. Filed July 25th, 1898. Wm. P. Freeman, clerk.

3 UNITED STATES OF AMERICA, } ss:
Indian Territory, }

In the Court of Appeals.

Pleas and proceedings in the United States court of appeals in the Indian Territory, at the city of South McAlester, before the Honorable William M. Springer, chief justice, and the Honorable John R. Thomas, William H. H. Clayton, and Hosea Townsend, associate justices; William P. Freeman, clerk.

THE LONDON & LIVERPOOL & GLOBE INSURANCE COMPANY, Appellant,
vs.
KEARNEY & WYSE, a Partnership Composed of T. K. Kearney and J. W. Wyse, Appellees.

Be it remembered, that on the 8th day of February, 1897, there was filed in the office of the clerk of the United States court of appeals in the Indian Territory, at South McAlester, a transcript of the record of the United States court for the southern district of the Indian Territory, in the above-entitled cause, which is in the words and figures following, to wit:

In the United States Court, Southern District, Indian Territory, at Ryan.

KEARNEY & WYSE, a Partnership Composed of T. K. Kearney and J. W. Wyse,
vs.
THE LONDON & LIVERPOOL & GLOBE INSURANCE CO., a Foreign Corporation.

Complaint at Law.

The plaintiffs, Kearney & Wyse, a partnership composed of T. K Kearney and J. W. Wyse, complaining of the defendant, The London & Liverpool & Globe Insurance Co., represent that they are both citizens of the United States residing in the town of Ardmore, Chickasaw nation, I. T., and the defendant is a foreign corporation doing business in said Chickasaw nation and having for its agent W. C. Baker, who resided in said town of Ryan, I. T. Plaintiffs state that they, on the 15th day of June, 1894, applied for the insurance in the defendant company, and that the defendant, for a valuable consideration to it paid by the plaintiffs, on said date issued a policy of insurance to the plaintiffs, whereby it agreed and bound itself to insure the plaintiffs' stock of hardware in the said town of Ardmore,

I. T., against loss from fire to the extent of $2,500.00, which said policy of insurance was in full force and effect at the time of the loss hereinafter complained of; and was to cover loss for the
4 period of one year from the said date thereof. That afterwards, to wit, on the 11th day of February, 1895, the defendant, for a valuable consideration by it received from plaintiffs executed and issued in favor of the plaintiffs another and second policy of insurance, whereby it agreed and bound itself to insure said stock of hardware belonging to plaintiffs against loss from fire for the additional sum of $1,000, which said policy was for the period of one year from the date thereof and was in full force and effect at the date of the fire as hereinafter alleged. That on the 19th day of April, 1895, without any fault on the part of the plaintiffs, and without their connivance, the said stock of hardware was destroyed by fire. That the value of said stock of hardware at the date of said fire was of the reasonable cash value of $10,000.00, and that the loss of the plaintiffs by said fire was greatly in excess of the amount of said policies. That by reason of said fire and the premises aforesaid, the defendant became indebted to the plaintiffs in the sum of $3,500.00; that no part of same has ever been paid, though demand for the payment thereof has been frequently made; that copies of said policies are hereto attached and made a part hereof, marked "A" and "B," all the conditions of which have been fully complied with by plaintiffs.

Wherefore the premises considered, the plaintiffs pray that the defendant be cited to appear and answer, and that on final hearing, they have judgment against the defendant for the sum of $3,500 with interest thereon at the rate of six per cent. per annum from the 19th day of April, 1895, until paid, for cost and all proper relief.

A. C. CRUCE AND
JOHNSON, CRUCE & CRUCE,
Attorneys for Plaintiffs.

J. W. Wyse, upon oath, says that he is one of the plaintiffs in the above-styled cause and that the matters and facts above alleged are true.

J. W. WYSE.

Subscribed and sworn to before me this the 13th day of July, 1895.

[SEAL.] T. B. JOHNSON,
Notary Public, Southern District.

Indorsed: "No. 13. Kearney & Wyse *vs.* The Liverpool & London & Globe Ins. Co. Petition. Filed July 15, 1895. Jos. W. Phillips, clerk."

5 In the United States Court for the Southern District in the Indian Territory, at Ryan.

KEARNEY & WYSE, a Partnership Composed of T. K. Kearney and G. W. Wyse, Plaintiffs,
vs.
THE LIVERPOOL & LONDON & GLOBE INSURANCE CO., Defendants.

Answer.

Comes now the Liverpool & London & Globe Insurance Co. and for answer to the plaintiffs' complaint filed herein, denies each and every allegation, statement, matter or thing therein not hereinafter specially admitted.

And further states: that on or about the 15th day of June, 1894, the said Liverpool & London & Globe Insurance Co. issued its policy of insurance to the plaintiffs herein, and that on or about the 11th day of February, 1895, the said Liverpool & London & Globe Ins. Co. issued its second policy of insurance for one thousand dollars ($1,000.00) to the said plaintiffs herein, insuring the property upon the terms and conditions as set out and declared upon in said policy of insurance. And the said Liverpool & London & Globe Insurance Co. specially refers to the policy of insurance above described attached to plaintiffs' bill of complaint, marked Exhibits "A" and "B" and make the same a part of this their answer.

And the Liverpool & London & Globe Insurance Co. further answering states that the said policy provided, among other things:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other policy or contract of insurance, whether valid or not upon the property covered in whole or in part upon this policy; and if the subject of insurance be a manufacturing establishment and be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days, or if the hazard be increased by any means within the control or knowledge of the insured; or mechanics be employed in building, altering or repairing the above-described premises for more than fifteen days at one time; or if the interest of the insured be other than unconditional and sole ownership, or if any change other than the death of the insured take place in the interest, title or possession of the insurance, whether by legal process or judgment or by voluntary act of the insured or otherwise."

Yet the said Liverpool & London & Globe Insurance Company avers the fact to be that in violation of said policy, the terms
6 and conditions thereof, the said risk was increased and became extrahazardous by the knowledge, consent and directions of said plaintiffs and that said plaintiffs were not the sole and unconditional owners of said property.

And further states that the said policy provided:

"If fire occur they shall give immediate notice of any loss thereby in writing to this company," and which the Liverpool & London & Globe Insurance Company allege the fact to be that the said plaintiff did not give immediate notice of any loss under the said policy to this company.

And further allege that the said policy provided that, "Said insured should within sixty days after the fire, unless such time is extended in writing by the company, make satisfactory proofs of loss." And said policy further provided: "That no loss under this policy should become payable unless said proofs of loss were made as required by said policy within the sixty days and received by said company." That the Liverpool & London & Globe Insurance Company allege that the said plaintiff has not made proofs of loss as required by said policy within the 60 days and delivered the same to the said Liverpool & London & Globe Insurance Company, and by reason of the failure by said plaintiffs to give the notice of loss and make satisfactory proofs within sixty days, as required by said policy, that no amount is due upon said policy of insurance, and that plaintiff *is* not entitled to recover.

And the Liverpool & London & Globe Insurance Company further allege that said policy contained the following provisions:

"The insured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business, and further covenants and agrees to keep said books and inventory securely locked in a fireproof safe at night and (—) all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to fire which would destroy the house where such business is carried on; and in case of loss the insured agrees and covenants to produce said books and inventory, and in the event of a failure to produce the same, this policy shall be null and void, and no suit or action at law shall be maintained thereon for any such loss," yet the Liverpool & London & Globe Insurance Company allege the fact to be that in violation of said condition and clause of said policy the said assured did not keep books showing a complete record of transactions
7 including all purchases or sales for cash or credit, nor any inventory of said business or memorandum securely locked in a fire-proof safe at night, or in a secure place, not exposed to fire, and did not have any fire-proof safe or any safe whatever, and did not keep nor furnish to the London & Liverpool & Globe Insurance Company, as requested, nor furnish as part of their proof of loss a record of their transactions of business, their sales for cash or credit or of their purchases, or an inventory of said business, and did not have any; and have failed, neglected and refused to comply with the condition of said policy as to the furnishing to the Liverpool & London & Globe Insurance Company a record of their business, including their purchases and sales for cash or credit, or the inventory of their business, and did not keep securely locked in a fire-

proof safe, nor did they have in their possession a fire-proof safe, nor other place in which they could secure the said records secure and not exposed to fire, and that by reason of the failure of the said plaintiffs to keep and retain a fire-proof safe and to keep and retain and deliver to the Liverpool & London & Globe Insurance Company, kept in said safe or other secure place a record of all purchases and sales for cash or credit and an inventory of their business, the said policy is null and void, and the said plaintiff- (*is*) not entitled to maintain this action. And that by reason of each and all the foregoing statements and averments, the said plaintiff- (*was*) unable and could not make satisfactory proofs of loss, and could not furnish the Liverpool & London & Globe Insurance Company the records and evidence of said loss as required by said conditions in said policy.

And by reason of each and all of the foregoing violations of said policy by the insured, the said policy is null and void, and the said plaintiffs are not entitled to maintain this action.

Wherefore, the Liverpool & London & Globe Insurance Company prays that it be dismissed with its costs.

QUINTON & QUINTON,
Att'ys for London & Liverpool & Globe Ins. Co.

STATE OF KANSAS, }
County of Shawnee. }

I, M. W. Van Valkenberg, being first duly sworn, on oath depose and say, that I am the general adjuster of the said Liverpool & London & Globe Insurance Company, and that I have read the foregoing answer, and the statements, averments and allegations therein contained and that the same are true.

M. W. VAN VALKENBERG.

8 Subscribed and sworn to before me this 12th day of September, 1895.

M. M. HEMPSTEAD,
Notary Public.

My commission expires Jan. 24, 1895.

UNITED STATES OF AMERICA, }
Indian Territory, Southern District. }

In the United States court in the Indian Territory, southern district, at a term thereof begun and held at Ryan, in the Indian Territory, on the 16th day of September, A. D. 1895, and on the 7th day of said term, to wit, the 23rd day of said month—present and presiding the Honorable Constine B. Kilgore, judge of said court—the following order was made and entered on record, to wit:

KEARNEY & WYSE
vs.
LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY. } No. 13.

Judgment.

Now on this day this cause came on regularly for trial. Both parties being present by counsel, announce ready for trial, whereupon came the following jury, to wit: J. G. S. Baker, R. J. Dunham, C. L. Brown, J. B. Jones, Bro. Evans, C. C. Daniels, Hugh Cook, W. B. Lewis, Geo. Brown, Green Brown, Wm. Dixon, and S. E. Stephens, who were duly empaneled and sworn to try the (*abobe*) cause. After hearing the evidence and instructions of the court and arguments of the counsel they retire in charge of a sworn bailiff to consider of their verdict. After mature deliberations they return in open court the following verdict, to wit:

"We the jury duly empaneled in the above cause, find for the plaintiffs in the sum of thirty-five hundred dollars and interest since the 19th day of April, A. D. 1895.

(Signed) W. B. LEWIS, *Foreman.*"

It appearing to the court that said verdict is supported by the law and the evidence and the premises being fully considered, it is therefore considered, ordered, and adjudged that the plaintiffs Kearney & Wyse, a partnership composed of T. K. Kearney and J. D. Wyse, do have and recover of the defendant, The London & Liverpool & Globe Insurance Company, the sum of thirty-five hundred dollars, with interest from the 19th day of April, A. D. 1895, and all their costs in this cause laid out and expended, for which let execution issue.

The above is a true copy from the record of an order made by said court on the 23rd day of September, A. D. 1895.

JOSEPH W. PHILLIPS, *Clerk,*
By H. F. COLLIER, *Deputy.*

9 In the United States Court in the Indian Territory, Southern District, at Ryan.

KEARNEY & WYSE, a Partnership Composed of T. K. Kearney and G. W. Wyse, Plaintiffs.
vs.
THE LIVERPOOL & LONDON & GLOBE INSURANCE CO., Defendant.

Motion for New Trial.

Comes now the defendant, The Liverpool & London & Globe Ins. Co. and moves the court that a new trial be granted in the above-entitled action upon the following grounds and reasons, to wit:

1st. Irregularity in the proceedings of the court, jury and pre-

ailing party by which defendant was prevented from having a fair rial.

2nd. Misconduct of the jury and prevailing party.

3rd. Accidents and surprise which ordinary prudence could not ave guarded against.

4th. Excessive damages appearing to have been given under the nfluence of passion and prejudice.

5th. Error in the assessment of the amount of recovery.

6th. The verdict is not sustained by sufficient evidence and is ontrary to law.

7th. Error of law occurring at the trial and excepted to by defendant at the time.

(8th.) ——.

QUINTON & QUINTON,
Attorneys for Defendant.

Indorsed: No. 13. Kearney & Wyse, plaintiffs, *vs.* London & Globe & Liverpool Ins. Co., def't. Motion for new trial. Filed in open court Sep. 28, 1895. J. W. Phillips, clerk. Quinton & Quinton.

UNITED STATES OF AMERICA, *Indian Territory, Southern District,* } *ss.*:

In the United States court in the Indian Territory, southern district, at a term thereof begun and held at Ryan in the Indian Territory on the 16th day of September, A. D. 1895, and on the 7th day of said term, to wit, the 23rd day of said month—present and presiding, the Honorable Constine B. Kilgore, judge of said court—the following order was made and entered on record, to wit:

KEARNEY & WYSE
vs.
THE LONDON & LIVERPOOL & GLOBE INSURANCE COMPANY. } No. 13.

Now on this day came on to be heard the motion of the defendant heretofore filed herein for a new trial in this cause. The court being well and sufficiently advised in the premises doth overrule said motion, to which ruling of the court the defendant then and there excepted and still excepts.

The above is a true copy from the record of an order made by said court on the 23rd day of September, A. D. 1895.

[SEAL.]

JOSEPH W. PHILLIPS, *Clerk,*
By H. F. COLLIER, *Deputy.*

In the United States Court, Southern District, Indian Territory, at Ryan.

KEARNEY & WYSE, Plaintiffs,
vs.
LIVERPOOL & LONDON & GLOBE INSURANCE CO.

It is agreed between the parties hereto that the time for making up and filing the bill of exceptions and perfecting the appeal herein made (—) extended thirty days from date hereof for the reason that the court stenographer has been sick and unable to furnish transcript of the evidence given in said cause.

It is further agreed that said bill of exceptions may be filed at any time within the next thirty days as of the time originally granted by the court within which to file said bill of exceptions.

A. C. CRUCE, *Attorney for Pl'ff.*
QUINTON & QUINTON,
Att'ys for Defendant Co.

In accordance with the above agreement it is hereby ordered by the court that the time heretofore granted in this case for the filing of the bill of exceptions herein be extended thirty days from the date hereof.

Dated this 18th day of December, 1895.

C. B. KILGORE, *Judge.*

In the United States Court for the Southern District of the Indian Territory, at Ryan, September Term, 1895.

KEARNEY & WYSE, Plaintiffs,
vs.
LIVERPOOL & LONDON & GLOBE INSURANCE CO.

Agreement.

It is agreed by and between the attorneys for the plaintiffs and defendant in the above-entitled cause that the time granted within which to file the bill of exceptions and perfect the appeal herein, may be extended thirty days from the expiration of the time
11 originally granted, and that the bill of exceptions if presented within said time of extension may be signed by the court as of the time originally granted for appeal herein.

A. C. CRUCE,
Attorney for Plaintiffs.
QUINTON & QUINTON,
Per B., *Att'ys for Def't.*

The above agreement being presented to the court, it is this day ordered that the (—) granted for appeal and filing a bill of exceptions in the above-entitled cause be extended thirty days from the expiration of the time originally granted to perfect appeal in this cause.

Dated 20th day of Dec., 1895.

KILGORE, *Judge.*

United States Court, Indian Territory, for the Southern District.

T. K. KEARNEY and J. W. WYSE, Partners as Kearney & Wyse, Plaintiffs,
vs.
THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, Defendant.

Bill of Exceptions.

Be it remembered, that on the trial of this action herein, Kearney & Wyse as plaintiffs, and Liverpool & London & Globe Insurance Co. as defendant, commencing on the 23rd day of September, 1895, at the regular term of 1895 of the United States court for the southern district, Indian Territory, beginning September 16, '95, and ending September 29, '95, *and* the plaintiff-, to make issues on *his* part, introduced the following witnesses, *which* testified as follows:

T. K. KEARNEY, a witness on behalf of plaintiff-, being duly sworn, testified as follows:

Direct examination:

Q. What is your name?
A. Kearney.
Q. Where do you live?
A. At Ardmore.
Q. What business are you engaged in?
A. Hardware.
Q. Have you a partner?
A. Yes, sir, I have a partner.
Q. Who is your partner?
A. J. W. Wyse.
Q. What is the name of the firm?
A. Kearney & Wyse.
Q. How long has that firm existed?
A. Why, about three years.
Q. Were you engaged in business at Ardmore on the 18th or 19th of April last?
A. Yes, sir.
12 Q. The hardware business?
A. Yes, sir.
Q. Where was your business located in Ardmore, Mr. Kearney?
A. On the south side of Main street.
Q. Were your goods all in one house or two houses?
A. All in houses connected, reached straight through the block.
Q. How many goods did you have?
A. Between ten and twelve thousand dollars' worth.

The question and answer objected to as incompetent, irrelevant, immaterial, not proper under the issues. Overruled. Exception.

Q. Were those goods or not destroyed by fire?
A. Yes, sir.
Q. When?
A. On the night of the 18th of April, 1895.
Q. Where did that fire originate?
A. In a livery stable on Caddo street.
Q. How far from your place of business?
A. I expect three hundred yards.
Q. Do you know how it originated?
A. No, sir.
Q. What other property did the fire consume that night?

Objected to as incompetent, irrelevant and immaterial, and not proper under the issues. Question withdrawn.

Q. Is it or not a fact that the fire which originated in that livery stable kept burning until it reached your house?
A. Yes, sir.
Q. These are policies of insurance, are they, Mr. Kearney, on your stock of goods?
A. Yes, sir.
Q. How much are they for?
A. $3,500.
Q. What is the amount of each one?
A. $2,500 in one and $1,000 in the other.
Q. Did you have an iron safe in that building?
A. Yes, sir.
Q. What kind of a safe was it?
A. Mosler safe.
Q. What kind of a safe was it with reference to whether it was fireproof?
A. It was supposed to be fireproof.
Q. Had you taken an inventory of your property, your stock at any time?

Objected to as incompetent, irrelevant, and immaterial, not the best evidence. The inventory itself will show.

By the COURT: I think he can ask him whether or not he had taken the inventory. Defendant excepts.

A. Yes, sir, we had.
Q. When had you taken the last inventory?

Objected to as incompetent, irrelevant, and immaterial, not the best evidence. Overruled. Exception by defendant.

13 A. About the 1st of January, 1895, as well as I recollect.
Q. Where did you keep that inventory?
A. In that safe.
Q. Where is that inventory now?
A. I cannot tell. Lost.
Q. When was it lost?

Objected to as incompetent, irrelevant, immaterial. Overruled, and excepted to by defendant.

A. Lost it that night.

Q. What did that inventory show was the value of your stock of goods when it was taken the 1st of January, 1894?

Objected to as immaterial, irrelevant and incompetent, not the best evidence. Objection overruled. Exception by defendant.

Q. Was or was not that a correct inventory of the property at the time it was taken?

Objected to as incompetent, irrelevant, immaterial, not the best evidence. Overruled. Exception.

A. Yes, sir, it was.

Q. What is the truth as to whether you and your partner kept a set of books that showed a record of your business?

A. Well, we kept a set of books, yes, sir, that showed a record of the business.

Q. Did it show your purchases?

A. Yes, sir.

Q. Show your sales?

A. Yes, sir.

Q. Cash and credit?

A. Yes, sir.

Q. Where were those books kept?

A. In the safe.

Q. In the same iron safe?

A. Yes, sir.

Q. Has the company at any time since the fire asked permission to examine those books?

A. Yes, sir.

Q. Were the books produced for them?

A. Yes. sir.

Q. What is the truth as to whether or not they made a statement from the books showing the goods you had on hand the night of the fire?

A. They never showed me any statement; they had a man working on the books getting up a statement.

Q. Who was the man?

A. N. C. McCoy.

Q. Was he a practical book-keeper?

A. I think so, he had that reputation.

Q. Was any proof of this loss ever made out for the company after the fire?

A. Yes, sir.

Q. How soon after the fire before the company received notice of the loss?

A. I don't know.

Q. Do you remember whether there was an agent there after the fire representing them?

A. Yes, sir.

Q. Who was it?

A. J. A. Mays.

Q. Any one else, any other agent?
A. No.
14 Q. Do you know a man by the name of Van Valkenberg who was there?
A. Yes, sir.
Q. Do you know how he came there?
A. He came as an adjuster.
Q. As an adjuster for the insurance company?
A. Yes, sir.
Q. How long after the fire before he got there?
A. I think about ten days.
Q. Who was their local agent at that time?
A. J. A. Mays.
Q. Was Mays the agent who countersigned these policies?
A. Yes, sir.
Q. Did Mays have notice of the fire and the loss after it occurred?
A. He was there himself.
Q. I will ask you whether or not he had notice that the fire consumed your stock of goods.
A. I never rendered him any invoice.
Q. Can you state whether or not he had notice of the fire and your loss?
A. I suppose he did; I don't know.
Q. Where did Mays live?
A. In Ardmore.
Q. Did you see him the day after the fire?
A. Yes, sir.
Q. Did you talk to him about this loss?
A. Yes, sir.
Q. The company knew Mays saw your house was burned up and your goods?
A. Yes, sir.
Q. Did you ever make a written statement for the company of the loss you had suffered that night?
A. We sent them proofs of loss.
Q. That is what I mean.
A. Yes, sir.
Q. Are these the proofs of loss on the two policies? Look at them. (Handing witness papers.)
A. Yes, sir.
Q. How soon after the fire were these proofs of loss—if they were ever submitted to the company—how soon were they sent?
A. They were sent from Ardmore on the 10th day of June, 1895.
Q. Where were they sent to?
A. Sent to the Liverpool & London & Globe Insurance Co.
Q. How were they sent?
A. They were registered.
Q. Sent by registered letter?
A. Yes, sir.
Q. What is that? (Handing witness card.)
A. Return receipt card for the registered letter.

Q. What does the receipt on that show? Does it show that the registered letter was received by the Liverpool & London & Globe Insurance Co.?

A. Yes, sir.

Q. When does it show it was received?

A. June 14, 1895.

Q. Was that, then, less than sixty days after the fire?

A. Yes, sir.

15 Here plaintiff- offers in evidence card above referred to and which is marked "Exhibit A," and made a part of the record herein.

Q. Mr. Kearney, in either one of these proofs of loss, was the statement attached showing the amount of cash sales and credit sales and the amount of your purchase from the last inventory taken before the fire?

Objected to as incompetent, irrelevant and immaterial, and not the best evidence. Overruled. Exception by defendant.

A. Yes, sir.

Q. Say whether or not that is the statement? (Handing witness paper.)

A. Yes, sir.

Plaintiff- here offers in evidence two copies of proof of loss which were sent to the company, embracing the statement showing the entire business transactions of the firm from the date of the last inventory, which was in January, 1894, down to date, and which are hereto attached and made a part hereof.

By the COURT: The last inventory had been lost?

Mr. CRUCE: Yes, sir, lost that night.

By the COURT: Without any negligence on the part of the plaintiffs?

Mr. CRUCE: We claim so.

Q. Mr. Kearney, did you or not remove the books from that safe on that night?

Objected to as incompetent, irrelevant, immaterial, leading, and not proper under the issues in this cause, a waiver not being pleaded.

Objection sustained in so far as it is leading.

Q. What did you do with your books that night the fire took place?

Objected to as incompetent, irrelevant, immaterial, and not proper under the issues of this case. Overruled. Exception.

A. When I saw we were going to burn I went into the house, into the store, and got the books out of the safe.

Q. Where was the fire when you went there with reference to your house?

A. It was directly over north in a house opposite, we were on the south side.

Q. Your house was catching fire?

A. Yes, sir, the glass broke as I went in there.

Q. What was your purpose in removing the books from that safe?

A. I wanted to remove the books, I thought it would be better to take them out than to run the risk of them in there.

16 Q. Did you or not endeavor to get all the books out of the safe and carry them to a place of safety?

Objected to as incompetent, irrelevant, immaterial, and not proper under the issues in this case.

Overruled. Exception.

A. Yes, sir.

Q. Were there any other books lost except the inventory.

A. Yes, sir.

Q. Do you remember what other books?

Objected to as incompetent, immaterial, and not proper to the issues in this case. Overruled. Exception.

A. I think so. An old cash book and probably some other old day book or blotter.

Q. Did you or not intentionally leave that inventory in there or any other book in that room that night?

A. I did not.

Q. How large a book was the inventory book?

A. It was a small book, paper back.

Q. About what was the weight of all these books you had to carry?

Objected to as incompetent, irrelevant, immaterial, and not proper under the issues herein. Overruled. Exception.

A. About 125 pounds.

Q. Number of volumes?

A. No, I mean the weight.

Q. Were there a number of books?

A. Yes, sir, several of them.

By the COURT:

Q. When did you first miss that book? Discover you had lost it?

A. When the safe was opened after the fire.

By the COURT: Did you close the same after taking the books out?

A. I just shut the door. I don't remember whether I bolted it or not.

By the COURT: Did you have other books left on the inside?

A. Yes, sir.

By the COURT: Were they preserved?

A. Yes, sir.

Mr. CRUCE: What was the condition of the books left in the safe?

A. We had an old book left there that the back was slightly burned.

Mr. CRUCE: We now offer in evidence the proofs of loss and ask to read them to the jury.

Objected to as incompetent, irrelevant and immaterial, not proper under the issues in this case. They have not shown the
17 original cannot be produced. Objection overruled. Exception by defendant, and proof of loss read to jury.

Q. Is that a complete showing of the business?
A. No, sir, that is only one of them.
Q. That is what was in the brick house, was it?
A. Yes, sir.

A copy of which proof of loss is attached hereto and marked "Exhibit B."

Proof of loss under $1,000 policy offered in evidence and a copy is hereto attached, marked "Exhibit C."

Q. You say Mr. Van Vaulkenberg, the adjuster, came around there?
A. Yes, sir.
Q. What effort was made to adjust the loss?

Objection as incompetent, irrelevant, immaterial, not proper under the issues in this case, as no waiver is pleaded. Objection overruled. Exception.

Q. State to the jury what effort was made between you and Mr. Van Vaulkenberg to adjust this loss.

Same objection and ruling as above.

A. He had N. C. McCoy make up a statement. I helped him, and we went through the books, and a statement was rendered to Mr. Van Vaulkenberg, and I had a meeting with him and we tried to adjust it; at least I tried.
Q. What did he do?
A. He made a proposal——

Defendant objects to any proposal to compromise, as that forms no part of the issues in this case: we might be willing to do a good many things rather than have trouble.

Cross-examination:

Q. Your name is Kearney?
A. Yes, sir.
Q. Have you the books here that you kept?
A. I have part of them.
Q. Are they present?
A. Yes, sir, in town.
Q. Will you produce them?

A. I can produce them.

Mr. CRUCE: We will produce them.

Q. What is the name of some of the books you have?

A. Cash book, ledger, day book.

Q. Cash book, ledger, day book, or blotter, or whatever you might term it?

A. Yés, sir, and the invoice book.

Q. The invoice book?

A. Yes, sir, and stock book.

Q. Are these all the books you keep?

A. Yes, sir.

Q. These are all the books you had?

18 A. Yes, sir.

Q. These are all the books you kept in the conduct of your business?

A. As we used them up; we had older books, of course.

Q. Did you say that inventory book was lost?

A. Yes, sir.

Q. Was that the only book lost?

A. No, sir.

Q. What other books were lost?

A. Why, as I stated awhile ago, there was an old cash book and some other books lost; I don't know just how many.

Q. You don't know how many?

A. No, sir.

Q. Nor whether they were day books, blotters, or cash books?

A. I know there was an old cash book and some other old books.

Q. Were they old books?

A. Yes, sir.

Q. How old?

A. They were the books we used preceding the ones we have now; I cannot tell you the date of them.

Q. What time in the night was this fire?

A. It was between 1 and 3 o'clock.

Q. How long had it been burning before it reached your store?

A. I came down it had destroyed the livery stable and the next thing was some houses on this side of the livery stable.

Q. How long do you know of its burning there before it reached your store?

A. I don't know how long; I cannot tell. I was working myself and took no note of the time. I tried to help put it out.

Q. Do you know how long you knew of the fire burning there before it reached your store? Your store was not the first one burned.

A. No, sir.

Q. How long before it reached your store did you know of the fire being there that night?

A. I do not know how long; I cannot tell.

Q. When you first discovered the fire that night was your store burning?
A. No, sir.
Q. From the time you first discovered the fire how long was it before your store was on fire?
A. Why I suppose it was probably half an hour or more.
Q. It went in a direct fire-line towards your store?
A. Yes, sir.
Q. Did you take anything else from the store that night other than those books from the safe?
A. I did not myself.
Q. You took nothing else?
A. No, sir.
Q. Did you make more than one trip to the safe after these books?
A. No, sir.
Q. Just one trip?
A. Yes, sir.
19 Q. Where were you when you lost the inventory you speak of, when you got out of the store?
A. No, sir, I do not know.
Q. I believe you stated it was a fireproof safe?
A. Supposed to be so far as I know.
Q. You left some books in there?
A. It proved afterwards that I didn't get them all.
Q. About what time of night was it you took these books from the fireproof safe?
A. As near as I could judge it was somewhere about two o'clock.
Q. What was your object in taking these books out of the safe?
A. Well, sir, I thought it was right I should take them out. I thought it was in justice to the company as well as ourselves that I try to save them.
Q. You knew, did you not, that the policy provided that you should keep them in that safe?
A. Yes, sir.
Q. You had warranted to do so in that policy?
A. Yes, sir, according to the writing there.
Q. That is true, is it not, according to your contract?
A. I am not personally——
Q. It is in the contract?
A. Yes, sir.
Q. You covenanted to keep them in there?
A. Yes, sir.
Q. These are all the books now you took from that safe that night?
A. Yes, sir.
Q. All the books you kept or had in there with the exception of the inventory book you say you lost?
A. That is what was saved.
Q. I will ask you to look at that book, Mr. Kearney, and state if

it is not a ledger kept in the way ledgers are kept according to a system of book-keeping?

A. Yes, sir.

Q. That book is a cash book?

A. Yes, sir.

Q. Is it not a fact that the ledger simply shows the total amounts taken in from the other books?

A. It shows the cash sales.

Q. When were these memoranda on this book made up, at the time of the sale?

A. Yes, sir, supposed to be, if we kept up with the books.

Q. When a sale was made for cash in the order of business there you put that on it?

A. No, sir, took it from my day book.

Q. This is not an original entry then?

A. Taken from the day book.

Q. This cash book is not an original entry book?

A. No, sir.

Q. Now what is this book?

A. We (*sic*) that for a day book.

20 Q. What does that book in a general way contain?

A. Shows all the transactions of the day.

Q. All the transactions of the day?

A. Yes, sir.

Q. This book then is the only one that shows the daily transactions?

A. That shows the entries and everything on there.

Q. The business of the day is contained in this book?

A. Yes, sir.

Q. And from this book the cash book and ledger are made up?

A. Yes, sir.

Q. These are all the books you have?

A. We kept our note book, showing the notes and everything taken from that book.

Q. Taken from this cash book. What do you mean by that?

A. When we sold a thing on time, we took a note in settlement.

Q. That also appears on the cash book?

A. It does not appear on the cash book but on the day book.

Q. On the day book I mean?

A. Yes, sir.

Q. Now that I may understand the facts about the matter; this day book contains all the day's transactions of that store during the day's business?

A. Yes, sir.

Q. From this this ledger is taken and made up?

A. And this other book here.

Q. You have note book you spoke of?

A. Yes, sir.

Q. These are the books that constituted the memoranda or evidences of your business done in that store?

A. Yes, sir.

Q. Now does that day book which I now hold before you show the cash sales and the credit sales of the day?
A. I don't think it did up to the time we burned.
Q. It did not show the sales made during the day?
A. It shows all the sales but has to be taken up.
Q. How is that?
A. It had to be taken from that.
Q. What did?
A. The sales, the cash sales.
Q. You say this does not show the cash sales during the day the (—) of that business prior to the time of the fire?
A. Why, yes; I think it does. The old cash book is there to show.
Q. Does not that day book right here, does it show, Mr. Kearney, the individual cash sales made each day in that store prior to the fire?
A. Separate from the other.
Q. What other?
A. The credit sales.
Q. Does it show the individual cash sales?
A. It shows all the business: yes.
Q. Does this day book show individual sales, I am speaking of that particular thing? Does how the individual cash sales made at your store during each day?
21 A. We kept that cash book, and we got everything from it.
Q. You can answer me yes or no. Does that day book show the individual cash sales of that store during each day?
A. The way we kept it, yes, I think it would.
Q. I will ask you again for that answer, please.
(Q.) That is all the books we kept and all the way we kept them.

Mr. CRUCE: I think the books show whatever was the condition.

By the COURT: I think it is fair for the counsel to examine with reference to whether it contains the entire record of the day's business.

Q. I will ask you if this day book shows each individual cash sales of the goods of the day.
A. It shows the sales of cash and all together.
Q. If a man came into your store to buy a hoe and it was $1.25 and it was on Tuesday, say, if John Doe came into your store on Tuesday and bought a hoe and paid $1.25 for it, would that appear upon this book?
A. No, sir, it would go in the cash drawer.
Q. Then the individual cash sales do not appear upon that book?
A. That is not the way we take it. We take it in and make up the cash from the drawer at night.

Q. Yet that is the only record you have or ever had of the individual cash sales made each day?

A. Yes, sir.

Q. At night you would count the cash in the drawer and then you would put on the day book the collections of sales, the total amount, so much money?

A. Yes, sir.

Q. That is the only record you had of the cash sales made each day or made at all?

A. Yes, sir.

Q. Now, Mr. Kearney, I will ask you if there appeared anywhere in that book in which you kept the transactions of your business anywhere from day to day the purchases you made?

A. Yes, sir.

Q. You say it does not appear there?

A. Yes, sir.

Q. Of all the goods you purchased?

A. Yes, sir.

Q. Each individual item?

A. No, not each individual item. Just in their bills as they came in.

Q. On this book you put the total amount of the bill you pay and charge to the firm?

A. Yes, sir.

Q. That is the way you kept it?

A. Yes, sir.

Q. Have you, Mr. Kearney, an invoice of all the goods purchased from the time you claim to have taken this last inventory up to the time of the fire?

A. Yes, sir.

22 Q. You have that, have you?

A. Yes, sir.

Q. You have it there?

A. Yes, sir.

Q. Now, Mr. Kearney, I will ask you if it is not a fact that as you got these bills of goods, the invoices of the goods shipped to you, the amount and so forth you would not transfer it from the bills to the ledger?

A. No, sir.

Q. You would put each one down on here?

A. Yes, sir.

Q. Each individual purchase?

A. Each bill received I entered in there as merchandise, on that book.

Q. You state you remember Mr. Van Vaulkenberg being there as adjuster of the company to see after this fire?

A. Yes, sir.

Q. At that time did he request of you or demand of you your books?

A. Yes, sir.

Q. Showing a complete record of the business, the purchases, sales and inventory?
A. Yes, sir.
Q. You didn't produce them for him, did you?
A. Yes, sir, everything we had.
Q. Did you produce the books he requested of you at that time as required by the policy to be kept?
A. Produced everything left from the fire.
Q. I am asking you if you produced for him at the time he requested them, the books required by this policy to be kept?
A. That is the only answer I can make. All the books we had left from the fire I turned over to him.
Q. Did you ever produce the book lost?
A. No, sir.
Q. Then you didn't produce for him all these books?
A. Not those that were lost.
Q. This ledger here contains your merchandise account?
A. Yes, sir.
Q. That is the only merchandise account you have?
A. Yes, sir.
Q. That is all the merchandise you purchased, is it?
A. Well, all within the time that book runs.
Q. All the time specified in the account?
A. Yes, sir.
Q. That covers the merchandise both in the store and warehouse?
A. Yes, sir.
Q. That is everything you had?
A. Yes, sir.
Q. Does that account, Mr. Kearney, show for itself what goods were in the warehouse and the goods in the store?
A. No, sir. I do not know that it does.
Q. This record of merchandise account foots up $60,124.80. Is that correct?
A. I expect it is.
Q. Is that the amount of merchandise you had on hand?
A. I didn't keep any regular balance of that. I don't know how it runs.
23 Q. It is dated from March 1st, 1895, and April 1st. Did you have $60,000 worth of merchandise in there at that time?
A. No, sir. That is carried over if you will notice.
Q. That is the total amount then of what?
A. I don't know how long it run.
Q. That would represent the total amount you had in there during some period of time?
A. Yes, sir.
Q. How long have you been in business there?
A. We have been there five years.
Q. That would represent then, might represent the total amount

of goods you owned in that store and had in there during that five years?

A. It might do it, but it don't.

Q. You don't know yourself what it does represent?

A. No, sir.

Q. Can you tell from these books?

A. By going over the invoice I can.

Q. You cannot tell from that book?

A. I do not know that I could. By going over the invoices I can tell.

Q. Did you keep a profit and loss account?

A. No, sir. I think I have got it in there, but I didn't keep up with it.

Q. Do your books show anywhere what the profits were?

A. No, sir.

Q. It does not show what your losses were?

A. No, sir.

Q. The books don't disclose what might be your profit or loss?

A. Yes, sir.

Redirect examination:

Q. About what was the value of the stock of goods in the wareroom?

Objected to as incompetent, irrelevent, immaterial and not proper under the issues herein.

Q. At the date of the fire I mean?

Same objection, not the best evidence. Overruled and exception.

A. I suppose about $4,000.

Q. Those in the wareroom?

A. Yes, sir.

Q. About what (—) you estimate the value of the goods in the brick house?

Objected to, incompetent, irrelevant, and immaterial and not proper to the issues in this case. Overruled. Exception.

A. About eight thousand dollars.

Q. You agreed in this iron-safe clause that you would keep these books and inventory in the fire-proof safe at night and at
24 all times when the store mentioned in this policy (*in this policy*) is not actually in use or that you would keep them in some secure place from a fire which would destroy the house. Where did you take these books after you removed them that night?

Objected to as incompetent, irrelevant, immaterial. Objection overruled and defendants except.

Q. Where did you take these books to?

A. Took them to my house.

Q. Was that property destroyed that night?
A. No, sir.
Q. The fire did not reach that far?
A. No, sir.
Q. This slip of paper containing this iron-safe clause, is that a part of your policy, or is it a slip of paper different attached to the policy?

Objected to as incompetent, irrelevant, and immaterial.

Q. Is that slip of paper a part of that policy? Is that iron-safe clause in the original policy, or is it on a slip of paper attached to it?

Same objection. Overruled. Exception.

(Q.) It is the paper attached to it.
Q. Is that slip of paper in large or fine print?
A. Fine print.
Q. Now, Mr. Kearney, about these books here; I believe this is the day book. That day book of itself does not show each cash item?
A. No, sir.
Q. But it shows the total sales?
A. Yes, sir.
Q. You had another book that did show the credit sales?
A. Yes, sir.

Objected to as incompetent, irrelevant, immaterial, and leading. Objection sustained in so far as it is leading.

Q. Is it not a fact that you kept a book showing the total sales and that you could tell the total sales?

Objected to as unfair and leading. The books are the best evidence. He can produce the books and explain what the books show.

By the COURT: He has a right to re-examine him upon any matter brought out.

Q. Are you a practical and expert book-keeper?
A. No, sir.
Q. Was Mr. Wyse?
A. No, sir.

Question and answer objected to as incompetent and immaterial.

25 Q. What is the truth, Mr. Kearney, as to whether or not these books you have here (I don't mean whether one book shows specifically the amount) show the total amount of cash sales?

Objected to as leading.

Q. What is the truth as to whether or not the books you have there show the total amount of cash sales and credit sales from the time of this last invoice to the time of the fire?
A. They did.

Q. They do?
A. Yes, sir.

Recross-examination:

Q. Mr. Kearney, on this slip attached to this policy, No. 10292, for $2,500, counsel asked you if the slip so attached to the policy was a part of the policy containing the slip. I will ask you if that policy in which that iron-safe clause and three-quarter clause appears on the slip, is not the only place in the policy, and the only piece of paper that has a description of these goods so insured?

A. I do not know that it has a description of the property at all; it says hardware, stock of hardware.

Q. Is it not the only description of the property insured in that policy, whatever its description may be, its location—the property insured contained in that slip attached to this policy in which the iron-safe clause and three-quarter clause?

A. Do you mean was there anything in the other part of the policy, the body of the policy?

Q. The property described as insured in this policy.

A. It shows on the face of it is all I know.

Q. The property insured in this policy, the description is only found in this slip?

A. I do not know whether it is found in the other part of the reading of it or not.

Q. I will ask you if the slip attached to policy 10292 in which the amount of insurance is $2,500, contained in the store form, the description being on the two-story brick building with metal roof and its additions adjoining and communicating, occupied by assured as hardware store, situated on lots five and six, block three, risk 85, Ardmore, Indian Territory; three hundred dollars on store and office furniture and fixtures, including iron safe while contained in said building; 42,200 on their stock of iron and steel, shelf and heavy hardware, cutlery, stoves, tinware, saddlery, buggies and carriages and other merchandise not more hazardous, such as is usually kept for sale in similar stores while contained in the
26 above building; is that not on the same slip of paper with the three-quarters-value clause and the iron-safe clause?

A. Yes, sir, it is on the same piece.

Q. That is the only place a description of that property as I have read to you is found in that policy, is it not?

A. I don't know; I have not read the other part.

Q. Look at it please. I will tell you and your attorney will tell you that it is the only one.

A. I do not see it in any other. So far as I know it is only in that slip there.

Redirect examination:

Q. These invoice books here, they show the amount of goods from each particular man?

A. Yes, sir, shows every bill.

Q. And the dates?
A. Yes, sir.
Q. They are bound in a volume?
A. In these two books there.
Q. I want to get it into the record that they are bound in a volume.
A. Yes, sir, it is.

J. W. WYSE, a witness in behalf of plaintiff-, being duly sworn, testifies as follows:

Direct examination.

By Mr. CRUCE:

Q. You live at Ardmore?
A. Yes, sir.
Q. Member of the firm of Kearney & Wyse?
A. Yes, sir.
Q. Your goods were destroyed the night of the 18th of April were they?
A. Yes, sir.
Q. Had you ever taken an inventory of that stock of goods?
A. We had taken an inventory I think about a year previous to the fire.
Q. About what time?
A. About January I think.

Question and answer objected to by defendant as incompetent, irrelevant and immaterial and not proper under the issues in the case—the attempt to prove that an inventory was taken.
Objection overruled. Exception taken.

Q. Where is that inventory now?
A. I do not know.
Q. Do you know it got lost or destroyed?
A. Yes, it was destroyed in the fire I suppose.
Q. Are you able to produce that inventory now?
A. No, sir.
Q. What was the value of your goods as per that inventory?

27 Objected to as incompetent, irrelevant and immaterial, not the best evidence and improper under the issues. Overruled. Exception.

A. About nine thousand dollars I think.
Q. Now where did you keep that inventory?
A. We kept it with the balance of the books in the safe.
Q. What kind of a safe?
A. Iron safe.
Q. Fireproof or not?
A. I suppose it was.
Q. Well, did the fire that night destroy the books left in the safe?
A. I do not know what was left in there; I do not know what was taken out.

Q. You did not open it?
A. No, sir.
Q. Were you there when it was opened?
A. No, sir.
Q. Was it purchased for a fireproof safe?
A. Yes, sir.
Q. Now, Mr. Wyse, what was the value of the goods in the brick house that night that were destroyed by fire?

Objected to as incompetent, irrelevant and immaterial, not the best evidence. Overruled. Exception taken.

A. About eight thousand dollars.
Q. About what was the value of the goods in the warehouse?

Same objection and ruling. Exception.

A. About four thousand dollars I think.
Q. You have seen the books introduced here; were they the books you kept?
A. Yes, sir.
Q. These two books you have got open here, do they show or not the total amount of purchases you made during that time?
A. Yes, sir.
Q. And the parties from whom you purchased?
A. Yes, sir.
Q. Do or not the books you have show the amount of sales made?
A. Yes, sir.
Q. Take your cash book and ledger and day book, all these books, do they or not show the amount of sales for cash and the amount for credit?
A. Yes, sir, they do.
Q. Do you remember whether Mr. Van Vaulkenberg, the adjuster for the insurance Co., was in Ardmore shortly after the fire?
A. Yes, sir.
Q. What effort, if any, was made to adjust your loss?

Objected to as incompetent, irrelevant and immaterial.
Objection sustained. Plaintiff- excepts.

Q. Did Mr. Van Vaulkenberg ask for these books?
A. Yes, sir.
28 Q. Were they produced for him?
A. They were produced.
Q. Did he or not have possession of these books and have a statement made from them?
A. Yes, sir.
Q. Did or not that statement show Mr. Van Vaulkenberg the amount of your cash sales and your credit sales during the time since the last inventory?

Objected to as incompetent, irrelevant and immaterial, not the best evidence—the books are the best evidence. Overruled. Excepted to by defendant.

Q. What is the truth as to whether he had a statement of that kind made by Mr. McCoy?

A. He had the statement made.

Q. Do you know where that statement is?

A. No, sir, we never had it after it was made.

Q. It is in their possession?

A. Yes, I suppose so.

Question and answer objected to as incompetent, irrelevant and immaterial. No effort made by plaintiffs' counsel to procure the original, if there was such, no demand made.

Q. What is the truth as to whether you made a demand upon the insurance company for that statement made by Mr. McCoy?

A. We made a demand.

Q. Did they produce it?

Objected to as incompetent, irrelevant, immaterial; an oral demand is not one contemplated by the statute. Overruled. Exception.

A. No, sir.

Q. Now, Mr. Wyse, when did the local agent for the company, Mr. Mays, ascertain that your goods were destroyed by fire?

A. While the fire was burning he was there.

Q. When did you first talk to him about the loss?

Objected to as incompetent, irrelevant and immaterial. Objection overruled. Exception taken.

A. While the fire was burning.

Q. How soon after the fire did Mr. Van Vaulkenberg come?

A. I don't remember; in a few days though.

Q. Did you ever make out proofs of loss and send to the company?

A. We hired a man and he made them out.

Q. Did you send the proofs of loss to the company, or not?

A. Yes, sir.

Q. Are these the two proofs of loss (producing papers)?

A. Yes, sir, they are copies.

29 Q. Are these accurate copies of what you sent them or not?

A. Yes, sir.

Q. When were these proofs of loss sent to the company?

A. About the 10th of June, I think; that card will show.

Q. (Handing witness cards for receipt of registered letter.) When does that card show it was received by the company, if ever?

A. June 14th.

Cross-examination.

By Mr. QUINTON:

Q. I believe, Mr. Wyse, these books were all the books you had of the business, the only account of your business was kept in them?

A. Yes, sir.

Q. You have no books showing a profit and loss account in your business?

A. No, sir.

Q. This merchandise book shows the (*the*) full amount of merchandise kept in both the warehouse and the brick building?

A. Yes, sir.

Q. Does it show separately the amount kept in either?

A. No, sir.

Q. Then from these books you cannot tell what was in the warehouse and what was in the brick building?

A. We kept no separate warehouse account.

Q. From that merchandise account you could not tell what merchandise was in the warehouse and what in the brick building?

A. No, sir.

Q. That is the only book you have containing a description of the merchandise kept in either or both of these places?

A. Yes, sir.

Q. You never have produced, have you, Mr. Wyse, the inventory as required by this policy, upon the demand of Mr. Van Vaulkenberg, the adjuster?

A. The inventory?

Q. The inventory as required by this policy, demanded by Mr. Van Vaulkenberg, have you?

A. We produced all the books we had.

Q. We understand each other, Mr. Wyse. I want it simply in there that you have not produced that inventory. You say it was lost and you never produced it?

A. No, sir.

Q. As demanded by Mr. Van Vaulkenberg?

A. No, sir.

Q. You do not know whether of your own knowledge that inventory, if there was such a one, was taken from the safe that night?

A. Do I know it?

Q. Yes, sir.

A. No, sir, I do not.

Q. Do you know whether it was destroyed by fire at the time of this fire you speak of, if there was one, do you know it?

A. I do not know it, no, sir.

Q. Do you know of your own knowledge that your partner, Mr. Kearney, here opened the safe about 2 o'clock at night?

A. Yes, sir.

Q. While this fire was progressing in this city, near the building, he took these books out?

A. Yes, sir.

Q. Took them from that safe?

A. Yes, sir.

Q. You know the policy required those books to be kept in that iron safe?

A. Yes, sir.

Q. These books you have were put in that safe at the conclusion of business on that day?

A. Yes, sir.

Q. Locked in there?

A. Yes, sir, I suppose the safe was locked; it was our custom.

Q. That was after business hours in the night?

A. Yes, sir.

Q. And before business hours in the morning that your partner opened that safe and took out certain books?

A. No, sir.

Q. And left the safe unlocked?

A. I do not know.

Q. I believe he said he did.

Mr. KEARNEY: I said I did not know for certain.

Q. This day book you have here does not show anywhere the individual cash sales made during the day, does it?

A. Not during the day, no, sir.

Q. And the only way you determined was at night to count the cash in your drawer, and at the bottom of the day's business the amount of cash money was put down so much, is that correct?

A. That was our custom.

Q. That was the way it was done?

A. Yes, sir.

Q. When the work of the day closed, did you simply count the money in the drawer and put down so much cash as representing your cash sales during the day?

A. Sales and collections so much.

Q. Then the amount of money you would count in the drawer represented the amount of sales and collections for the day?

A. Yes, sir.

Q. As a matter of fact, then, Mr. Wyse, you have no record of the exact amount of sales made each day, have you?

A. Yes, sir, the amount of sales shows on that book.

Q. If you should (*see*) $20 worth of goods and a man should come in and pay you $70 cash, your cash book would show the amount of sales and collections $90?

A. Yes, sir.

Q. There would be nothing to show how much cash sales there were and how much the collections were?

A. Yes, sir.

Q. Sales and collections so much——

31 A. Yes, sir; if you wanted to know them separately, just deduct the credit sales from the cash and you would see how much cash there was.

Q. The only record kept is the sales and collections?

A. The credit sales.

Q. Then this book simply shows the credit sales made during the day, and then at night you put down this memoranda of cash and collections so much in money?

A. Yes, sir.

Q. If you wanted to know what the credit sales were the book would show for itself?

A. Yes, sir.

Q. How could you tell what the amount of the cash sales were when the total amount in the drawer would be put down only?

A. The total amount of money—if we wanted to know what credit sales there were, just refer to the day's business.

Q. I am not asking you about the credit sales. You (*sale*) the cash sales and collections so much——

A. Yes, sir.

Q. If the cash sales were $20 and the collections $70, the item on the books would be cash sales and collections $90?

A. Yes, sir.

Q. Then would you have any evidence to show what were the cash sales and what were the collections?

A. If we wanted to determine it I would turn to the bills receivable.

Q. Would this book show how much cash sales were made that day and how much collections, this day book you kept?

A. Yes, it would show.

Q. Will you find it for me. On this day cash sales and collections $79.25; tell me how were cash sales. (Referring to page in day book.)

A. I would have to refer to this book to see what the cash and collections were.

Q. Does it show what the cash sales are, aside from the collections. Can you tell from that book what the amount of the cash sales were on any particular day?

A. Yes, sir.

Q. Tell me what the cash sales on this day, $79.20 call it?

A. It says cash and collections.

Q. Didn't you say a moment ago you could not tell from that book itself the amount, you would refer to some other book?

A. The cash book, if there was any error, we could catch up with it on the cash book. If there were any credit sales, they show on there.

Q. We are not talking of any credit sales, Mr. Wyse; we are going to get that point out. (Hands witness book.) Now there is an item, Mr. Wyse, of cash collections and sales, will you tell me from that book what the sales were on that day?

32 A. I can get mighty close to it if you will give me a pencil so I can figure it out.

Q. Can you tell me from that book what the cash sales were on that day? (Witness has pencil and figures.)

Mr. QUINTON: I submit it should be answered.

By the COURT: If he can figure it out and tell it——

A. I think I can do so.

Mr. QUINTON: This book-keeping is guaranteed and covenanted to be in a certain way; and the question is whether the witness has kept the books in that certain way.

WITNESS: I did not keep the books; I am not an expert bookkeeper. There may be some of these entries I don't understand exactly now.

Q. Now, Mr. Wyse, that I may be understood by the court and jury both, you state that this item here in this day book, cash collections and sales were put there from the amount of money you had in the cash drawer at night; is that correct? Didn't you testify and didn't Mr. Kearney testify that you counted the cash in the cash drawer at night, and from the amount you had there you would make a memoranda on that book of collections and sales for that day, so much money; is that true?

A. I do not understand you.

Q. Well, here on this day book now, on April 15th, is collections and sales $64.85; that amount was taken from your counting the money in the cash drawer, was it not?

A. Yes, sir.

Q. Now, that is the only place from which you did get that amount, is it not, the amount of money you had in the cash drawer?

A. And entries through the day.

(—.) Does that represent the amount of credit sales?

A. No; there may be still credit sales in there; there may be sales and collections.

Q. There would not be credit sales and collections made that day?

A. If there was any collections made on that day, they were counted in.

Q. And the cash sales were counted in there made that day?

A. Yes, sir.

Q. Then the amount represents both the cash sales and the collections and not the credit sales, made on that day?

A. Yes, sir.

Q. Can you tell now from that amount how (—) was collections and how much cash sales on that day?

A. I believe I can tell.

33 Q. I will ask you this question: Do you know from that item there how much the cash sales and collections were on that day?

A. Yes, sir.

Q. Do you know from that entry there how much were cash sales and how much were collections?

—. ——.

Q. Do you know from that what the cash sales were for that day, from this $54.86?

A. I think I do.

Q. Do you know from this entry, Mr. Wyse, cash sales and collections $64.85, from that entry, just how much was cash sales and how much was collections? Just look at that single entry.

A. No, sir; I don't

Q. Now, then, have you any book showing the amount that you claimed your inventory amounted to, your last inventory?

Mr. CRUCE: the inventory of January, 1894.

A. It was burned.

Q. Have you got any books or record showing the amount of what your last inventory was?

A. No book.

Q. Then from what do you get the statement of what the amount of what your last inventory was in January, 1894?

A. We have got the books, but not the inventory.

Q. Have you got the books? Have you got any books showing the amount of what your last inventory was on January 1st, 1894?

A. No books.

Q. How can you make a statement of that amount of that inventory?

A. We sent to R. G. Dun & Co., and it was taken from our invoice they had.

Q. Are you testifying to the amount of the inventory of Jan. 1st, 1894, from the report of R. G. Dun & Co., what they had down, what you reported to them?

A. Yes, sir.

Redirect examination:

Q. I believe you stated you made the statement to R. G. Dun & Co. taken from this inventory, is that correct?

A. Yes, sir.

Q. Since the fire you have sent to R. G. Dun & Co. and got a copy of it?

A. Yes, sir.

Here defendant moves to strike out the last two answers of witness. Overruled. Exception.

Mr. CRUCE, attorney for plaintiff-: We have a letter here from E. J. Warner, resident secretary of the Insurance Co., which we desire to introduce.

Defendant objects because it is not proven.

34 M. W. VAN VAULKENBERG, called and sworn as witness for plaintiff-, testified as follows:

Direct examination:

Q. What is your name?

A. M. W. Van Vaulkenberg.

Q. What is your business?

A. A State agent for the Liverpool & London & Globe Insurance Co.

Q. You were the adjuster who was in Ardmore just after the fire representing the Liverpool & London & Globe Insurance Co.?

A. Yes, sir.

Q. Do you know Ezra J. Warner?
A. I think not.
Q. Do you know there is a man of that name connected with the Liverpool & London & Globe Ins. Co.?
A. No, I do not know it of my own knowledge.
Q. Did you ever receive any communication from him?
A. No, sir.
Q. You are adjuster for the company and State agent and never received any communication from him, from a man of that name?
A. No, sir, I never have.
Q. Is there a man connected with that company named Ezra J. Warner?
A. Our policy blanks always show that Ezra J. Warner was a member of the Chicago board of directors; I cannot say whether he is now or not.
Q. Shows that he is chairman of the Chicago board of directors; and you can't tell whether he is now or not?
A. I do not know.
Q. Has anybody the right, or is anybody authorized to use that letter-head except officers of the Liverpool & London & Globe Ins. Co.?
A. Certainly.
Q. You answer that certainly other persons except the officers and agents of this company had a right to use this letter-head?

(Referring to letter which Mr. Cruce desires to introduce.)
Objected to as incompetent.

Q. Can you tell this jury now who are the directors of the Chicago branch of the Liverpool & London & Globe Insurance Co.?
A. I cannot, I do not know.

Mr. CRUCE: I ask the court to look at the latter part of that policy. Ezra J. Warner is placed there as chairman of the Chicago board of directors.

J. K. KEARNEY, recalled by plaintiff-, testifies as follows:

Q. Look at that letter and say how you came in possession of it?
A. Why, I wrote to the Liverpool & London & Globe Ins. Co. at Chicago, and this is the reply.

35 Mr. VAN VAULKENBERG recalled.

Examination by Mr. CRUCE:

Q. What is the date of the last policy of insurance issued by the Liverpool & London & Globe Insurance Co. that you have seen?

Objected to as incompetent, irrelevant, and immaterial.

A. I cannot answer that.
Q. Have you seen a policy issued by that company from the Chicago department at any time within the last year that was not signed by Ezra J. Warner? Before a policy could become binding

and valid, is it not a fact that your policy must be signed by a director before they become binding?

A. Not necessarily.

Q. Who signs them then?

A. They are signed. Let me understand you. Before these policies issue——

Q. You answer my question.

A. These policies are printed in bunches of ten to a thousand. I think we have policies now that are signed by Mr. Warren who has not been a manager for years.

Q. You answer before this jury that you do not know whether Mr. Ezra J. Warner is a director of that company or not?

A. I do.

Q. You state that you have had no communication from him and that you are State agent for that company?

A. Yes, sir; I did not have any business with Mr. Warner.

Objection to introduction of letter withdrawn, and said letter is here read to the jury as evidence and marked "Exhibit D."

T. K. KEARNEY recalled.

Examination by Mr. CRUCE:

Q. This day book here, I will ask you what is the truth as to whether or not you have entered all cash sales and all credit sales and all collections?

A. We have entered them upon that book.

Q. Turn to April 13th, 1895. The memorandum on your cash book shows bills receivable $8.55, A. J. Deal, look on the 13th day of April and see whether that shows.

A. Yes, sir; cash received A. J. Deal, $8.55.

Q. Well, now, is there or not any memorandum of the day book by which you can tell whether that is for the sale of goods or cash receipts?

A. I know by that entry that is not for the sale of goods.

Q. This cash book, was it or not made up every night from the record made in that book?

A. Yes, sir.

36 Q. On this cash book running from Jan. 1st, 1894, to April 19, 1895, have you or not made on that book the entries on each day's business embracing the cash sales and cash collections?

A. Yes, sir; we have sometimes run over a day.

Q. I don't mean have you done it every night. I mean have you entered it on that book?

A. Yes, sir.

Q. You could make the entry on this book and transcribe them a week later if you wanted to.

—. ——.

Q. Well, take Apr. 13th, '95. Look at that page in the cash book. What entry does it show?

A. It shows so much money on hand. $28.25, shows $4.50 bills receivable, $8.55 received from A. J. Deal, cash sales $86.95.

Q. The entries on this book show each day's business from the time of the inventory down to the fire, the amount of money realized that day from cash sales, the total amount?

A. Yes, sir.

Q. And the amount taken in cash collections which were not taken on that day?

A. Yes, sir.

Q. Does it show the different persons from whom the cash sales were collected on that day?

A. No, sir.

Q. The day book I believe you said embraces the credit sales and the total cash sales?

A. Yes, sir.

Cross-examination:

Q. As I understand you this day book does not show the items here separately, the amount of collections and the amount of each cash sale?

A. Yes; it does show it.

Q. I thought you stated the collections and cash sales were put in (all together) and the cash book showed.

A. It is all there and if you will look over each item you will see; take the collections from it and it shows the cash sales.

Q. I understand you to say the collections were put in the cash book?

A. They are taken from that book though.

Q. Then you have got a double entry of the collections; added in twice on this book, each time?

A. No, sir.

Q. This total amount of sales and collections here, $65.85 is the amount of cash you had in the drawer at night, is it not?

A. Yes, sir.

Q. That includes both collections and cash from sales?

—. ——.

Q. If you collect from A $50 that would appear?

A. Yes, sir.

Q. Suppose when you got through at night, you counted the cash and you had received $40 in cash and $15 from collections. You would put down $55?

A. Yes, sir; sales and collections.

Q. Sales and collections $55?

A. Yes, sir.

37 Q. As a matter of fact that would show $15 cash on the book?

A. No, sir, it would show $15 collections, $40 cash sales.

Q. Have you got it charged by items as you (—) cash on this book?

A. They are entered as it is received, the money.

Q. As you receive it on collection?
A. Yes, sir, as so much money.
Q. Then you would have the item collections and sales added in making the $55?
A. Making $55 sales and collections, so much collections and so much sales.
Q. You are in business now?
A. Yes, sir.
Q. Are you keeping your books in the same way?
A. No, sir.
Q. Now your book showing your invoice of purchases that only one you have is this book—the original bills as made out by the houses and pasted on slips?
A. Yes, sir.
Q. That is the only book you have?
A. Yes, sir.
Q. Just your original bills pasted in?
A. Yes, sir, that is all.
Q. And that is the only book you produced in compliance with the request for your books and records in keeping this store?
A. Yes, sir, I produced all the books I had.
Q. These here are all you had?
A. Yes, sir.
Q. Why did you change your system of book-keeping?
A. Well, I wanted it a little clearer in case of another fire or something of that kind.

Redirect examination:

Q. Your inventory book gave the amount of the purchases right on down to the fire as I understand you; and the goods you bought from every man, you just pasted the bills in there as you purchased them and they all appear in that book?
A. Yes, sir.
Q. Each item?
A. Yes, sir.

Plaintiff rests.
Defendant rests.

No. 10292. $2,500.00.

The Liverpool & London & Globe Insurance Co.,

Liverpool, 1 Dale Street. Chicago. London, Cornhill & Charing Cross.

In consideration of the stipulation herein named and of $82.60 premium does insure Kearney & Wyse, Ardmore, I. T., for the term of one year from the 15th day of June, 1894, at noon, to the fifteenth day of June, 1895, at noon, against all direct loss or damage by fire, except as hereinafter provided.

38 To an amount not exceeding twenty-five hundred dollars, to the following-described property, while located and contained as described herein, and not elsewhere, to wit:

Store form.—Nothing on the two-story brick building with metal roof and its additions adjoining and communicating, occupied by assured as a hardware store, situated lots 5 and 6, block 3, risk 85, Ardmore, I. T.

$300.00 on store and office furniture and fixtures, including iron safe while contained in said building.

$2,200 00 on their stock of iron and steel, shelf and heavy hardware, cutlery, stoves, tinware, saddlery, buggies and carriages and other merchandise not more hazardous, such as are usually kept for sale in similar stores, while contained in the above-described building.

It is expressly stipulated and agreed that no "gasoline fire-pot" shall be used at this risk, and in case of non-fulfillment of this condition this policy shall be void.

Permission to keep five barrels of refined coal oil or petroleum of lawful fire test, not to be dealt out by aid of artificial light or fire heat within a distance of fifteen feet; also to use such oil for lights, all lamps to be filled and trimmed by daylight only.

Permitted to keep not exceeding 50 pounds of gunpowder to be sold by daylight only, except in unbroken packages.

Three-fourths-value clause.—It is part of the consideration of this policy and the basis upon which the rate of premium is fixed, that in the event of loss, this company shall not be liable for a greater amount than three-fourths of the actual cash value of the property covered by this policy at the time of such loss, and in case of other insurance, whether policies are concurrent or not, then for only its *pro rata* proportion of such three-fourths value.

Total insurance permitted is hereby limited to three-fourths of the cash value of the property hereby covered and to be concurrent herewith.

Iron-safe clause.—The assured under this policy hereby covenants and agrees to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the

39 store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and, in case of loss, the assured agrees and covenants to produce such books and inventory, and in the event of the failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss.

Exposure clause.—It is understood and agreed, that if any change of exposure takes place during the life of this policy without due notice to the company, this policy shall be void.

Reference had to assured's application and survey No. — on file which is assured's continuing policy and a part hereof.

Ardmore, Ind. Ter., Feb. 11, 1895.

It is hereby expressly stipulated and agreed that this policy shall cover only on property insured while contained in the two-story brick building only, and not on the property contained in additions adjoining and communicating.

Attached to policy No. 10292 of L. & L. & G. Ins. Co.

J. A. MAYS, *Agent.*

(Form for removal.)—Permission is hereby granted to remove the property insured by this policy to the two-story brick building with metal roof, occupied as hardware store situate block 3, lots 4 and 5, risk 84, Ardmore, I. T., and this policy is hereby made to cover same property in new locality, all liability in the former locality to cease from this date.

This slip being attached to policy No. 10292 of the Liverpool & London & Globe Ins. Co. of Liverpool, England, and issued at its Ardmore, Ind. Ter., agency, forms part of said policy.

Rate in new location same add'l prem. ——, ret. prem. ——.

Dated Sept. 11th, 1894.

J. A. MAYS, *Agent.*

5 M., 10, '93.

1 This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused,
2 and shall in no event (—) what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or if they differ then by appraisers as hereinafter provided; and (—)

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3 the amount of loss or damage have been thus determined, the sum for which this company is liable pursuant to this policy shall be payable after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of
4 this policy.

It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, replace or rebuild the property lost or damaged with other of like kind and
5 quality with- a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandon-
6 ment to this company of the property described.
7 This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance
8 or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any
9 fraud or false swearing by the insured touching any

matter relating to this insurance or the subject thereof whether before or after loss.

This entire policy, unless otherwise provided by agreement indorsed herein or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment, and it be operated in whole or, in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within-described premises more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of the insurance be personal property and be or become incumbered by a chattel mortgage; or if with the knowledge of the insured, foreclosure procedure be commenced or notice of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change other than by the death of the insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise, or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage of custom or trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be (*sued*) for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight, or at a distance not less than ten feet from artificial light); or of a building herein described, whether intended for occupancy or for tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is

endangered by fire in neighboring premises; or (unless fire ensues and, in that event, for the damage by fire only) by explosion of any kind or lightning may be assumed by specific agreement herein.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidence of debt, moneys, notes or securities; nor unless liability is specifically assumed hereon for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor beyond the actual value destroyed by fire, for loss occasioned by ordinance of law regulating construction or repair of buildings; or by interruption of business, manufacturing processes, or otherwise, nor for any greater proportion of the value of plate glass, frescoes and decorations than that which this policy shall bear to the whole insurance on the building described.

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If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premiums having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice, it shall only retain the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist, in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions

and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall for the ensuing five days only cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged property, put it in the

best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company shall render a statement to this company, signed and sworn to by the insured, stating the knowledge and belief of the insured, as to the time and origin of the fire, the interest of the insured and all others in the property; the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon; all other insurance whether or not covering any of the said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location and possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire; and shall furnish if required verified plans and specifications of any building, fixtures or machinery destroyed or damaged; and shall also if required furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examina-

tions under oath by any person named by this company and subscribe the same; and as often as required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost at such reasonable place as may be designated by this company or its representative and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers the insured and this company each selecting one, and the two chosen shall first select a competent and disinterested umpire; the appraisers shall then estimate and appraise the loss stating separately sound value and damage and failing to agree, shall submit their difference to the umpire; and the award in writing shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

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This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company including an award by appraisers when appraisers have been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by an expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto, liability for insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the

foregoing requirements, nor unless commenced (without)
107 twelve months next after the fire.
108 Wherever in this policy the word "insured" occurs it
109 shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be
110 deemed the equivalent of "loss or damage."
111 If this policy be made by a mutual or other company having special regulations lawfully applicable to its or-
112 ganization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached or appended hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or

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other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

In witness thereof, the Liverpool & London & Globe Insurance Co. has caused these presents to be signed by one of its directors and attached by one of its resident secretaries at Chicago, Ills., but this policy shall not be valid until countersigned by the duly authorized and regularly commissioned agent of this company at Ardmore, I. T.

Chicago.

Examined.

Entered, William S. Warren, resident sec., Ezra J. Warner, director.

Countersigned at Ardmore, I. T., this the 15th day of June, 1894.

J. A. MAYS, *Agent.*

Directors in New York:

Chairman, Chas. H. Marshall; John Crosby Brown, J. E. Pulsford, Edmund D. Randolph, John A. Stewart.

Resident manager, Henry W. Eaton.

Deputy manager, Geo. W. Hoyt.

Directors in San Francisco:

Chairman, William A. Vord; Levi Strauss, Lovell White, William Babcock.

Resident secretary, Chas. D. Haven.

Directors in Chicago:

Chairman, Ezra J. Warner; Levi Z. Leiter, Henry W. King.
Resident sec., William S. Warren.

Directors in New Orleans:

Chairman, Gustaf R. Westfeldt; L. C. Fallon, Lucas E. Moore, C. M. Soria.
Resident sec., Henry V. Ogden.

Directors in Liverpool:

Chairman, Alfred Fletcher; George Melly.
Deputy chairmen, J. Bibby, Sir T. Brocklebank, Bart.; A. Castellain, A. Earle, Author P. Fletcher, H. B. Gilmour, H. H.
46 Nicholson, S. Sandbach Parker, H. L. Smyth, W. H. Tate, E. J. Thornwall.
Gen. manager & sec., J. M. Dove.
Sub. manager, T. I. Alsop.

Directors in London:

Chairman, Sir C. Nicholson, Bart., D. C. L.
Deputy chairmen, G. D. Whatman, W. Pleydell Bouverie, W. J. R. Cotton, alderman; Hon. Sir E. Drummond, F. Fanning, A. Flower, Hon. S. Car Glyn, Right Hon. Lord Lawrence, Cosmo Romilly.
Actuary of the company and res. sec., Aug. Hendriks.

Standard fire-insurance policy of the State of New York.
Expires June the 15th, 1895.
Property, fix. and stock.
Amount $2,500.00. Premium, $82.00.
Kearney & Wyse.
No. 10292.

The Liverpool & London & Globe Insurance Company.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

J. A. MAYS, *Agent.*

Assignment of interest by insured.

The interest of —— —— as owner of the property covered by this policy is hereby assigned to —— —— subject to the consent of the Liverpool & London & Globe Insurance Company.

—— ——.

Dated —— —, —.

Consent by company to assignment of interest.

The Liverpool & London & Globe Insurance Company hereby consents that the interest of —— —— as owner of the property covered by this policy be assigned to —— ——.
Dated —— —, —.

Assignment of interest by insured.

The interest of —— —— as owner of property covered by this policy is hereby assigned to —— —— subject to the consent of the Liverpool & London & Globe Insurance Company.

—— ——.

Dated —— —, —.

47 Consent by company to assignment of interest.

The Liverpool & London & Globe Insurance Co. hereby consents that the interest of —— —— as owner of the property covered by this policy be assigned to —— ——.

—— ——.

Dated —— —, —.

Receipt for return premium to be filled out and signed by the insured.

—— AGENCY, —— —, 18—.

In consideration of — dollars return premium receipt of which is hereby acknowledged, this policy is hereby cancelled and surrendered to the company.

—— ——, *Insured.*

No. of policy.....
No. of renewal.....
Amount insured, $.....
Dt. of cancel'n.....
Dt. of policy.....
Time in force.....
Premium paid, $.....
Premium earned at — rate.....
Premium returned, $.....
If *pro rata*, state reason.....

No. 10346. $1,000.00.

The Liverpool & London & Globe Insurance Co.,

Liverpool, 1st Dale street. Chicago. London, Cornhill & Charing Cros-.

In consideration of the stipulations herein named and of forty-six and $\frac{50}{100}$ dollars' premium,

Does insure Kearney & Wyse for the term of one year from the eleventh day of February, 1895, at noon, to the eleventh day of February, 1896, at noon, against all direct loss or damage by fire, except as herein further provided.

To an amount not exceeding $1,000.00 to the following-described property, while located and contained, as (*description*), and not elsewhere, to wit:

Kearney & Wyse, $1,000.00 on their stock of stoves, nails, plows, implements, tinners' tools, buggies, woodenware and other mer-

chandise not more hazardous such as are usually kept for sale by the hardware trade all while contained in the (onse-store) frame building with (s-ingle) roof and the one-story frame building
48 with metal roof, occupied by assured for warehouse purposes, and the one-story frame building with shingle roof, occupied by assured as a tin shop; all of said building situated, lots 4 and 5, block 3, risk 85*a*, — Ardmore, Indian Territory.

Permission of keeping for sale five barrels of refined coal oil or petroleum of lawful fire test, not to be dealt out by aid of artificial light, or fire heat within a distance of fifteen feet; also, to use such oil for lights, all lamps to be filled and trimmed by daylight only. Permitted to keep not exceeding 50 lbs. of gunpowder to be sold by daylight only, except in unbroken packages.

Three-fourths-value clause.—It is a part of the consideration of this policy and the basis upon which the rate of premium is fixed that in the event of loss, this company shall not be liable for any amount greater than three-fourths of the actual cash value of the property covered by this policy at the time of such loss, and in case of other insurance, whether policies concurrent or not, then for only its *pro rata* proportion of such three-fourths value.

Total insurance permitted is hereby limited to three-fourths of the cash value of the property hereby covered and to be concurrent herewith.

Iron-safe clause.—The assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transactions, including all purchases and sales both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store (*maintains*) in the within policy is not actually open for business or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and in case of loss, the assured agrees and covenants to produce such books and inventory, and in the event of a failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss.

Exposure clause.—It is understood and agreed that if any change in exposure takes place during the life of this policy without due notice to company, this policy shall be void.

Reference had to assured's application and survey No. — on file, which is assured's continuing warranty and a part thereof.

1 This company shall not be liable beyond the actual cash value of the property at the time any loss or damage
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occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper
2 deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured (*or*) replace the same with material of like kind and quality; ascertainment or estimate shall be made by the insured

and this company, or if they (*defer*) then by appraisement as herein further provided; and the amount of loss or damage having been thus determined, the sum for which the company is liable pursuant to this policy shall be payable after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy.

It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value and also to repair building or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after receipt of the proof herein, required of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance (*concurring*) this insurance or the subject thereof; or if the interest of the assured in the property be not truly stated herein; or in case of any fraud or false swearing by the assured touching any matter relating to his insurance or the subject thereof, whether before or after the loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manfacturing establishment and it be operated in whole or in part at night later than 10 o'clock, or if it cease to be operated for more than 10 consecutive days; or if the hazard increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within-described premises for more than fifteen days at any one time, or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on grounds not owned by the insured in fee-simple, or if the subject

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of insurance be personal property and be or become incumbered by a chattel mortgage; or if with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change other than the death of the insured take place in the interest, title or possession of the subject of the insurance (except change of occupants without increasing of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating

gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage of custom or trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding 25 lbs. in quantity, naphtha, nitro glycerine or other explosive, phosphorus or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for light and kept for sale according to law, but in quantities not exceeding 5 barrels, provided it be drawn and lamps filled by daylight or at a distance not less than 10 ft. from artificial light); or if the building herein described, whether intended for occupancy by owner or tenant be or become unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by the order of any civil authority; or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidence of debt, money, notes or sureties; nor unless liability specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings,

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dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools or property held on storage or for repairs; nor beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing process, or otherwise; nor for any greater proportion of the value of plate glass, frescoes and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the

agent of this company. This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal, or this policy shall be void. This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice, (—) exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance, other than the interest of the insured as described herein, the condition hereinbefore contained shall apply in the manner expressed in such provision and condition of insurance relating to such interest as shall be written upon, attached, or appended hereto. If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of the policy in excess of *this* proportion of any (*laws*) and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in a new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations;

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but this company shall not, in any case of removal whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn — by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof and the amount of the loss thereon; all incumbrances thereon; all other insurance, whether valid or not covering

any of said property and a copy of all the description
73 and schedule in all policies; and changes in the title, use, occupation, location, possession, or expenditures, of said property since the issuing of this policy; by whom and
74 for what purpose any building herein described and the several parts thereof were occupied at the time of the
75 fire; and shall furnish if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not in-
76 terested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes
77 the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any
79 person designated by this company all that remains of
80 any property herein described, and submit to examina-
81 tion under oath by any person named by this company,
82 and subscribe the same; and as often as required, shall produce for examination all books of account, bills, in-
83 voices and other vouchers or certified copies thereof if originals be lost, at such reasonable place as may be
84 designated by this company or its representative, and
85 shall permit extracts and copies thereof to be made.

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In the event of disagreement as to the amount of loss
86 the same — as above provided be ascertained by two com-
87 petent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall
88 first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the
89 loss, stating separately sound value and damage, and failing to agree, shall submit their difference to the umpire and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the
90 appraiser respectively selected by them and to bear
91 equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture
92 thereof by any requirements, act or proceeding on its
93 part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until after the notice, ascertainment, estimate, and
94 satisfactory proof, of the loss herein required have been received by this company, (*indulging*) an award by ap-
95 praisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described prop-
96 erty, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured

shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the

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insured, and wherever the word "loss" occurs, it shall be held the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its (*origination*), membership, policies, or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except as by the terms of this policy may be the subject of agreement endorsed hereon or added (*hereon*), and as to such provisions (*the*) conditions, no officer or agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privileges or permission affecting the insurance under the policy exist or be claimed by the insured unless so written or attached.

In witness whereof, the Liverpool & London & Globe Insurance Company has caused these presents to be signed by one of its directors, and attested by its resident secretary at Chicago, Ills., but this policy shall not be valid until countersigned by the regularly commissioned agent of this company at Ardmore, I. T.

Chicago: William S. Warren, resident secretary; Henry W. King, director.

Entered: Countersigned at Ardmore, I. T., this the 11 day of Feb., 1895.

J. A. MAYS, *Agent.*

Assignment of interest by insured.

The interest of —— —— as owner of property covered by this policy is hereby assigned to —— —— subject to the consent of the Liverpool & London & Globe Insurance Co.

Consent by company to assignment of interest.

The Liverpool & London & Globe Insurance Co. hereby consents that the interest of —— —— as owner of the property covered by this policy be assigned to —— ——.

—— ——.

Dated —— —, —.

55 Assignment of interest by insured.

The interest of —— —— as owner of property covered by this policy is hereby assigned to —— —— subject to the consent of the Liverpool & London & Globe Insurance Co.

—— ——.

Dated —— —, —.

Consent by company to assignment of interest.

The Liverpool & London & Globe Insurance Co. hereby consents that the interest of —— —— as owner of the property covered by this policy be assigned to —— ——.

—— ——.

Dated —— —, —.

Receipt for return premium to be filled out and signed by the insured.

—— AGENCY, —— —, —.

In consideration of — dollars return premium, receipt of which is hereby acknowledged, this policy is hereby cancelled and surrendered to company.

—— ——, *Insured.*

No. of policy.....
No. of renewal.....
Am't insured, $.....
Date of cancellation.....
Date of policy.....
Time in force.....
Premium paid, $.....
Premium earned at rate.....
Premium returned, $.....
If *pro rata*, state reason.....

Directors in New York:

Chas. L. Marshall, chairman; J. E. Pulsford, Edmund D. Randolph, Jno. Crosby Brown, John A. Stewart.
Resident manager, Henry W. Eaton.
Deputy manager, Geo. W. Hoyt.

Directors in San Francisco:

Chairman, William Alvord; Levi Stratus, Lovel White, William Babcock.
Resident secretary, Chas. D. Haven.

Directors in Chicago:

Chairman, Ezra J. Warner; Levi Z. Leiter, Henry W. King.
Resident secretary, William S. Warren.

56 Directors in New Orleans:

Chairman, Gusta R. Westfeldt; Lucas E. Moore, L. C. Fallon, C. M. Sorria.
Resident secretary, Henry V. Ogden.

Directors in Liverpool:

Chairman, Geo. Melley.
Deputy chairmen, J. Bibby, E. J. Thornweill, Sir T. Brocklebank, Bart.; A. Castellain, A. Earle, Author P. Fletcher, H. B. Gilmore, H. H. Nicholson, S. Sandbach Parker, H. L. Smyth, Geo. Holt, W. H. Tate, Alfred Fletcher.
General manager and sec'y, J. M. Dove.
Sub. manager, T. I. Alsop.

Directors in London:

Chairman, Sir C. Nicholson, Bart., D. C. L.
Deputy chairmen, C. D. Whatman, Sir W. J. R. Cotton, alderman; Hon. Sir E. Drummond, F. Fanning, Hon. S. Carr Glyn, Right Hon. Lord Lawrence, Cosmo Romilly.
Actuary of the company and resident secretary, August Hendriks.

Standard fire-insurance policy of the State of New York.
Expires Feb. 11th, 1896.
Property, stock, W. H.
Amount $1,000.00. Premium, $46.50.

Kearney & Wyse.

No. 10348.

The Liverpool & London & Globe Insurance Company.

It is important that the writing of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

J. A. MAYS.

Proof of Loss.

No. 490. Am't of policy $1,000.
No. of policy, 10348. Proof of loss.

No. of last renewal, ——.

Liverpool & London & Globe Insurance Co. of Liverpool.

By your policy of insurance No. 10348 dated Feb. 11, 1895, insured at your agency at Ardmore, Ind. Ter., said insurance commencing at 12 o'clock noon on the 11th day of Feb, 1895, and terminating at 12 o'clock noon on the 11th day of Feb., 1896, you insured Kearney & Wyse against loss or damage by fire to the amount of one thousand dollars according to the terms and
57 conditions printed in said policy, the written portion, together with correct copy of all endorsements, assignments and the transfers being as follows:

Kearney & Wyse. $1,000.00. On their stock of stoves, nails, plows, implements, tinners' tools, buggies, woodenware and other merchandise not more hazardous such as is usually kept for sale by the hardware trade, all while contained in the one-story building with shingle roof and the one-story frame building with metal roof, occupied by assured for warehouse purpose, and the one-story frame building with shingle roof occupied by assured as a tin shop. All of said building situate (—) lots 4 and 5, block 3, risk 85 A, Ardmore, Ind. Ter., which said policy was subsequently continued in force by renewal, No. — until the — day of —— 189-, at 12 o'clock noon.

The total insurance on said property or any part thereof, at the time of the fire, including the above-mentioned policy was one thousand dollars ($1,000.00) and no more.

In schedule of additional insurance, with the name of each company, date and expiration of each policy, note of premium, and the entire written portion of each policy and all endorsements, assignments, or transfers thereon.

A fire occurred on the 18th day of April, A. D. 1895, at about the hour of 2 o'clock a. m. by which the stock of hardware and tinners' tools described was destroyed or (*damed*) to the extent of twenty-four hundred, eleven and $\frac{75}{100}$ dollars and originated as follows, viz: In a frame livery stable on the west side of Caddo street, block 4, cause of fire unknown to assured.

The actual cash value of each specific subject thus situated and insured in the aforesaid policy at the time of loss and actual loss and damage by said fire to the same, and for which claim is hereby made, was as follows, viz:

	Sound value.	Loss or damage on same.	Ins. on same.
	3,436.46	2,411.75	1,000.00
Total sound value, total loss or damage and total.....	3,436.46	2,411.75	1,000.00

Insurance for a more particular statement of same, see schedule annexed. And the assured claim of the Liverpool & London & Globe Insurance Co. by reason of said loss, damage and policy on the insurance, the sum of — one thousand dollars.

58 The personal property referred to belongs to Kearney & Wyse, the assured, which firm was composed of I. K. Kearney and J. W. Wyse and no other, and said parties constituted said firm at the time said policy was issued (or assigned), and there has since been no alteration or change in partnership interest in said firm or the property referred to or any part thereof, nor in said policy, and deponent further says that all the merchandise and personal property for which they make claim was at the time of the fire contained in a building and premises described in said policy and that said (*claims*) have faithfully scheduled and reported all the personal property saved from the fire and correctly stated the actual cash value thereof.

The building referred to, and for the loss or damage to which claim is made belonged to —— —— and was owned and held by —— —— in fee-simple, and the title thereto or any part thereof has not been conveyed nor in any way alienated since said insurance was effected (or assigned) and at the time of the fire there were no attachments or executions levied on said property and no proceedings in law or equity had been commenced to foreclose any mortgage thereon, or in any way to dispute the title, and no other person had any interest in said property or any part thereof.

The building referred to, or containing the property destroyed or damaged was occupied in its several parts by the parties hereinafter named and for the following purpose, to wit: Kearney & Wyse assured. Warehouse and tin shop and no other.

The said fire did not originate by any act, design or procurement on their part, nor on the part of any one having any interest in the property described or in the said policy of insurance, nor in consequence of any fraud or evil practice done or suffered by them; that nothing has been done by or with their privacy or consent to violate the conditions of the policy or render it void; and that no articles are mentioned herein but such as were in the building damaged or destroyed, and belonged to, and in the possession of, said insured at the time of the said fire; and no property saved has been in any manner concealed, and that no attempt to deceive the said company as to the extent of said loss or otherwise has in any manner been made. Any other information that may be required will be furnished on call and considered a portion of these proofs.

It is furthermore understood and agreed that all (*bids*), invoices, schedules and statements made by the insured and attached
59 to this proof of loss (*or*) to be incorporated into this proof, and are hereby sworn to and made a part thereof.

The furnishing of this blank to the assured or making up proofs by adjuster for company is not to be considered as a waiver of any rights of the company.

Witness our hands at Ardmore, Ind. Ter., this the 8th day of January, 1895.

T. A. KEARNEY,
Of and for the Firm of Kearney & Wyse.

Personally appeared T. K. Kearney, signer of the foregoing statement, who made a solemn oath to the truth of the same and that no material fact is withheld that the company should be advised of before me this 8th day of June, 1895.

N. H. McCOY,
Notary Public, Southern Dist., I. T.

Certificate.

(*State of*) INDIAN TERRITORY, } ss:
Southern District, }

I, N. H. McCoy, notary public in and for said county, residing most contiguous to the property of Kearney & Wyse insured as set forth in the foregoing affidavit, certify that I am not concerned in that loss or claim, either as creditor or otherwise, nor related to the insured or sufferers, and that I am acquainted with the character and circumstances of said Kearney & Wyse, and having made diligent inquiry into the facts set forth in the foregoing statement, believe that they really, by misfortune, without fraud or evil practice, sustained by the described fire loss and damage to the amount of twenty-four hundred and eleven and $\frac{75}{100}$ dollars, the sum stated in the foregoing affidavit of loss.

In testimony whereof, I have hereunto set my hand and official seal, this 8th day of June, 1895.

N. H. McCOY,
Notary Public.

Apportionment of Loss, Showing Amount Insured and Payable by Each Company.

No. of policy.	Date of expiration.	Name of Co.	First item, Loss, $2,411.75.
		Insures on item.	Pays on item.
10348.	Feb. 11, 1896.	Liverpool & London & Globe.	
Claim No. —.			

60 *Proof of Loss.*

Assured, Kearney & Wyse.
Agency, Ardmore, Ind. Ter.
Policy, No. 10348.
Amount of policy, $1,000.00.
Amount claimed, $1,000.00.
Amount awarded, $1,000.00.
Date of fire, April 18th, 1895.
Proofs received, ——, 189–.
Date of payment, ——, 189–.
Adjuster, —— ——.

Schedule or Statement of Loss.

Value of stock entirely destroyed			$1,634 60
" " damaged			1,316 60
Add freight paid			442 53
			$3,392 73
Depreciate 5%			169 63
Value of stock at date of fire			3,223 10
Value of tinners' tools	$226 70		
Add freight paid	40 00		
		$266 70	
Depreciate 20%		53 34	
			213 36
Total value of property covered by policy			$3,436 46

A schedule of the property of Kearney & Wyse contained in the one-story frame building with metal roof, occupied by assured for a warehouse, and the one-story frame building adjoining and communicating and occupied by assured for a tin shop, situate lots 4 and 5, block 3, Ardmore, I. T., and burned April 18th, 1895.

A List of Property Entirely Destroyed.

Articles.		Value.
11 doz. ⅜-in. screen doors	$7 75	$85 25
4 doz. 1⅛	8 30	33 20
3 doz. 1¼ fancy	13 75	41 25
60 1-gal. jar-, 40 2-gal., 13 5-gal., 15 6-gal., 12 8-gal., 6 10-gal., 7 3-gal., 7 4-gal., 12 ½ low butters, 12 1 low butters, *12 1 low butters,* 12 2-gal. churns, 18 3-gal. churns, 15 4-gal. churns, 15 5-gal. churns, 12 6-gal. churns, 15 ½-gal. jugs, 15 1-gal. jugs, 866 gal., 7c	....	60 62
550 pots and saucers	....	26 75
3 doz. doubletrees	1 50	23 00

1 doz. shafts and bars	....		6 25
1 doz. poles and circles	....		7 25
5 one-horse plow beams, 25c	....		1 25
61 10 two-horse plow beams, 35c	....		3 50
8 doz. plow handles	1 00		8 00
3 sets D. wheels, net	....		16 50
30 sets spokes, net	....		51 50
3 sets spokes "B"	2 56		6 68
6 bent rims, 80	....		4 60
4 doz. singletrees	1 25		5 00
30 hickory axles	....		40
30 oak tongues, 40 and 45	....		13 00
10 sets of sawed felloes, 75c	....		7 50
25 coupling poles, 20c	....		5 00
15 bolsters, 25c	....		3 75
48 sets sawed fellers, 75c	....		36 00
10 sets spokes	1 25		12 50
26 prs. hounds	....		4 30
28 sets wagon and buggy bows, 75c	....		21 00
6 neck yokes	....		1 00
5 prs. seat springs, 50c	....		2 50
4 prs. shaft shackles	....		1 75
200 plow bolts	....		4 00
200 bu. of charcoal, 15c	....		30 00
3 large oil cans	3 50		18 50
1 14-in. Texas sulky plow	....		29 00
1 lot of stove elbows and hods	....		10 00
2 hay rakes	10 00		20 00
1 gasoline stove	..		18 00
24 boys' wagons	1 50		36 00
700 ft. of gal. well casing, 11c	....		77 00
8 rolls of wire netting	2 00		16 00
3 grain cradles	1 33		4 00
37 walking plows	6 00		222 00
1 double plow	...		6 50
1 check rower (corn-planter)	....		36 00
1 pump	....		6 00
2 wall tents	7 50		15 00
5 riding cultivators	22 50		112 50
5 walking cultivators	15 00		75 00
15 cotton-planters	7 00		105 00
1 6-plow cultivator	....		25 00
4 mower tongues	....		2 50
1 lot rake extras	....		10 00
1 buggy tongue	...		5 00
2 wooden-beam harrows	4 50		9 00
5 double-shovel plows	1 90		9 50
24 Georgia stocks, 65c	....		15 60
200 lbs. charcoal sheet iron	3 25		6 50
1 lot of manufactured flues	....		40 00
1 lot of manufactured, rain proof	....		30 00

	Articles.	Value.	
62	6 doz. ventilators	2 00	12 00
	3 boxes, 28 x 20, tin	....	36 00
	2 boxes, 14 x 20, tin	....	12 00
	100 lbs. solder	....	4 00
	1 building, Russian iron	....	9 00
	24 small drums	1 50	36 00
	6 large drums	....	10 50
	2 doz. well buckets, drilled, 60c	....	14 00
	100 lbs. zinc	....	6 00
	2 doz. flue caps	1 00	2 00
	1 lot manufactured tin valley	....	15 00
	Total		1,634 60

A List of the Property Damaged.

Articles.	Value.	Damage.
918 lbs. plow steel, $1 90	$17 45	$8 20
60 lbs. octagon and square steel, $7 50	4 50	2 25
132 lbs. iron, $1 70	2 24	1 12
40 lbs. iron, 2 40	96	48
27 lbs. cruc. spg. steel, $35	2 52	1 26
100 lbs. ger. ham lay steel, $23 75	22 20	11 10
200 harrow teeth, 2c	4 00	2 00
15 lbs. blank and cut nuts	3 00	1 50
10 sets thim. sk. net	9 60	4 80
4 sets short A. T. axles	7 18	3 59
85 kegs nails, 1 65	140 25	70 12
30 sq. cornered iron, 2 40	72 00	54 00
37 heating, 3 00	111 00	83 25
23 cook stoves, 6 50	149 50	112 12
10 wash kettles, 1 25	12 50	9 37
6,000 lbs. barbed wire, 2 00	120 00	60 00
500 lbs. smooth wire, 2 50	12 50	6 25
1 steel harrow	10 50	7 85
500 blast iron, 2 50	12 50	9 37
1,000 gal. iron, 3 60	36 00	27 00
1 walking plow, D. B. #3	6 05	2 00
1 T. R. 8 plow, walking	6 00	2 00
2 57½ 6 6 0 walking plow	13 20	4 40
2 29 v. 9 3 90	7 80	2 90
10 B. 58 8 80	88 00	29 33
14 B. 75	115 50	35 20
7 B. 57 walking plows	50 05	16 68
3 B. R. #9 " "	26 40	8 80
1 B. S. B. " "	12 35	4 00
3 B. R. #8 " " 8 00	24 00	8 00
1 #6 " " "	14 00	4 35
For'd	1,117 50	505 14

63 Amount for'd of property entirely destroyed..... $1,634 60

Continuation of the Property Damaged.

Article.	Value.	Damage.
Forward	$1,117 50	$595 14
2 riding cultivators 22.50	45 00	15 00
1 walking cultivator	15 00	5 00
1 rake	14 00	4 65
4 double-shovel plows	6 60	2 20
1 disc harrow	25 00	8 35
1 tri-plow	34 50	14 50
1 stalk-cutter	19 00	6 35
1 sulky plow	25 00	8 35
2 cotton-planters 7.00	14 00	4 65
Total	1,315 60	

Tinners' Tools.

Article.	Value.	Damage.
1 set tinners' chisels	35	35
2 pr. hand snaps 4.50		
1 circle # 8 3.00		
1 beav. shears 4.00 net	8 00	8 00
1 Stowe's standard 2.00		
1 Stowe's wiring mach. 1.00	2 38	1 76
1 pr. cutting nippers	1 10	1 10
1 gutter-beater	8 50	8 50
1 gasoline fire-pot	5 00	5 00
1 lot of sample patterns	25 00	25 00
1 Acme square shears	37 00	27 25
1 gro-ver, with stand	10 67	8 00
2 euch wire mach. 25.25		
1 burring mach. 10.50		
1 set-down mach. 9.75 net	35 99	26 97
1 30-inch forging mach	13 18	9 75
1 # 52 Stowe holder	23 73	23 73
1 Stowe crimper	6 50	4 87
1 blow-horn stake		
1 beak horn # 1		
1 hatchet # 4		
Square head		
Hollow mandrel net	21 69	16 25
1 Stowe's bender	8 70	8 70
1 hard-groover	52	52
1 patent beater	16 15	16 15
3 rivet sets	1 19	1 19
1 ½-in. hollow punch	1 05	1 05
Total	226 70	194 66

Memorandum of adjusters.

64 Chicago branch.

The Liverpool & London & Globe Insurance Company, Liverpool, England.

124 La Salle St.,
Chicago, *May* 17*th*, 1895.

Messrs. Kearney & Wyse, Ardmore, I. T.

Gentlemen: I am in receipt of your favor of 9th inst., (*calling*) my attention to the loss by fire sustained last month, and asking my personal consideration in connection with your claim against the company.

Since receiving your communication, I had an interview with the resident secretary of this department, Mr. Warren, and have thoroughly reviewed with him the facts in possession of the department in connection with your loss. I find, on investigation, that the insurance companies doing business in your territory and in cities like Ardmore, except insurance only on special conditions, and that what is known as the "iron safe clause" is made part of every policy written there.

It appears from the report of the company's adjuster that you have not complied with the requirements of this part of your policy (although well known to you as an essential to the acceptance by the company of your risk) and are unable to establish in an intelligent and satisfactory manner the extent of your loss.

Under these circumstances, while sympathising with you in your disaster, I do not feel warranted in asking the company (—) reconsider their decision in this matter, and make a concession to yourselves which they have declined to extend to other policy-holders who have failed to comply with the terms of their policies. At my request, the resident secretary has stated fully the conditions of the company in connection with your claim, and I enclose this reply.

Very truly yours, EZRA J. WARNER.

This is a statement of the allegations of the plaintiff's cause of action and of the defendant's grounds of defense which is agreed upon by counsel upon both sides, and which precipitates the issue between them.

The principal question you are called upon to determine in this case, and about the only question of fact, material question of fact, is whether under this policy, the plaintiffs, Kearney & Wyse, have in the main, complied with the terms of that policy.

Under the exact terms of the policy, and the exacting terms of it,
65 I may add, they were required to keep a complete set of books by which they could exemplify every day's transaction of their business: and they were required to keep a book containing an inventory last made by plaintiffs before the fire. They have produced a set of books, and explanation of which you have heard made by the plaintiffs, and seems to be substantially in compliance with the terms of the policy upon that subject.

The controversy arises over a missing book, the book containing

the last inventory that was taken of their stock before the fire. The policy requires that they should deposit these books in an iron safe for protection, or in some other safe place. Now, if they had been guilty of negligence in the discharge of that duty, and the discharge of the obligation imposed by the policy, they would not be entitled to recover, and that is a question you must pass upon. It is contended by the plaintiffs, that when the fire was on, a great fire, sweeping a whole town out of existence, in order to protect their records and books in accord with the obligations which this policy imposed upon them, they opened the safe and took from it what they supposed to be all the books relating to the business. It is contended that in the act of removal of these book to a safer place, or what seemed to have been the purpose of the plaintiffs in that regard, the book about which this contention exists, was lost. If it was in the safe, and in taking it out it was lost in the excitement and destroyed, you are instructed that the loss or destruction of that book and the failure to produce it, would not in itself defeat a recovery. If there was a fraud perpetrated in its loss or destruction, or the parties were guilty of any negligence, or a want of due care under the circumstances, when the book was lost that would be sufficient to defeat a recovery; but if they acted in good faith, with the use of diligence and care that business men usually employ, the loss of that book under the circumstances would not defeat a recovery, and they would be entitled to a verdict.

You are instructed that under the terms of what is called the "iron-safe clause" of the policy, the plaintiffs bound themselves to keep a set of books showing a complete record of the business transactions of the plaintiffs, including all purchases and sales both for cash and credit, together with the last inventory of their business; and that the plaintiffs further agreed to keep such books and inventory securely locked in a fireproof safe at night and at all times when the store mentioned in the policy was not actually opened for business, or in some secure place, not exposed to fire which would destroy the house where business was carried on.

66 Now, if the plaintiffs kept such books and inventory locked in a fireproof safe on the night that the books were destroyed by fire, and the plaintiffs for the purpose of better protecting said books and inventory attempted to remove them (*from*) some other secure place, not exposed to the fire which would destroy the house in which the business was carried on, and in such effort, any part of the books were destroyed without any fault or carelessness on the part of the plaintiffs, the plaintiffs were acting within the scope of authority granted them by said iron-safe clause of said policy.

You are, gentlemen of the jury, sole judges of the evidence and of the weight to be given the testimony, and the credit to be given the witnesses.

You are further instructed that the burden of proof in this case is upon the plaintiffs to make out their case by a preponderance of the evidence to the satisfaction of the jury; and as you determine by your deliberations you will find in your verdict.

Whereupon, the counsel for the defendant arose and stated: I desire to except to the instruction asked by the attorney for the plaintiff; and also, to some portions of your honor's charge. There are some parts of the charge I do not desire to except to.

Whereupon, the court remarked: Very well, sir, you will be permitted to take your exceptions.

And afterwards, to wit, on the 13th day of January, 1896, the defendant prepared *his* exceptions to said charge, as it contends in accordance with the permission above given, and herewith presents the same as follows, and asks that they be made a part of the record in this cause, and allowed as exceptions.

The court refused to allow said exceptions, but permitted the same to be printed in the record for the purpose of enabling the court of appeals to determine whether said exceptions are properly taken. The charge, with the exceptions thereto tendered by the defendant, is as follows:

Instructions to the Jury.

No. 1. Statement of the facts of the case agreed to by both parties.

In this case the plaintiffs sued the defendant for $3,500, alleged to be due by reason of two insurance policies executed by the defendant, one for the sum of one thousand dollars, executed Feb. 11, 1895, and one for the sum of $2,500.00, executed June 15th,
67 1894. The defendants deny their liability under said policies and claim that the plaintiffs failed to comply with the terms of said policy in that the plaintiffs were not the sole owners of the property insured and that they did not give immediate notice of their loss in writing to the company; that they did not make satisfactory proof of loss to said company within sixty days after the fire, and that they did not keep a set of books showing a complete record of their business transactions, including all purchases and sales, both for cash and credit, together with the last inventory of said business, and that they failed to keep such books and inventory in a fire-proof iron safe as required by said policies, and have failed to produce the records and books as required by said policy as requested by defendant company; and failed and refused to produce the inventory required by said policies and requested by the defendant.

This is a statement of the allegations of the plaintiffs' cause of action and of the defendant's grounds of defense which is agreed upon by counsel upon both sides and which precipitates the issue between them.

The principal question you are called upon to determine in this case and about the only question of fact, material question of fact, is whether under this policy the plaintiffs, Kearney & Wyse have in the main complied with the terms of that policy.

Under the exact terms of the policy and the exacting terms of it, I may add, they were required to keep a complete set of books by which they could exemplify every day's transaction of their business; and they were required to keep a book containing an inven-

tory last made by the plaintiffs before the fire. They have produced a set of books, an explanation of which you have heard made by the plaintiffs, and seems to be substantially in compliance with the terms of the policy upon that subject.

The controversy arises over a missing book, the book containing the last inventory that was taken of their stock before the fire. The policy required that they should deposit these books in an iron safe for protection, or in some other safe place. Now, if they had been guilty of negligence in the discharge of that duty in the discharge of the obligation imposed by the policy, they would not be entitled to recover; and that is a question you must pass upon. It is contended by the plaintiffs that when the fire was on, a great fire, sweeping a whole town out of existence, in order to protect their records and books in accord with the obligations which this policy imposed upon them, they opened the safe and took from it
68 what they supposed to be all the books relating to the business. It is contended that in the act of removal of these books to a safer place (or what seemed to have been the purpose of the plaintiffs in that regard) the book about which this contention exists, was lost. If it was in the safe, and in taking it out it was lost in the excitement and destroyed, you are instructed that the loss or destruction of that book and the failure to produce it, would not in itself defeat a recovery. If there was a fraud perpetrated in its loss or destruction, or the parties were guilty of any negligence, or a want of due care under the circumstances, when the book was lost that would be sufficient to defeat a recovery; but if they acted in good faith, with the use of diligence and care that business men usually employ, the loss of that book under the circumstances would not defeat a recovery, and they would be entitled to verdict.

Thereupon counsel for defendant objected and excepted to all that portion of the above instructions which is in words and figures as follows, that is to say:

"Now, if they had been guilty of negligence in the discharge of that duty, in the discharge of the obligation imposed by the policy, they would not be entitled to recover; and that is a question you must pass upon. It is contended by the plaintiffs that when the fire was on, a great fire, sweeping a whole town out of existence, in order to protect their records and books in accord with the obligations which this policy imposed upon them, they opened the safe and took from it all the books relating to the business. * * * If it was in the safe, and in taking it out it was lost in the excitement and destroyed, you are instructed that the loss or destruction of that book and the failure to produce it would not in itself defeat a recovery. If there was a fraud perpetrated in its loss or destruction, or the parties were guilty of any negligence or a sufficient want of care under the circumstances, when the book was lost, that would be sufficient to defeat a recovery. But if they acted in good faith, with the use of diligence and care that bnsiness men usually employ, the loss of that book under the circumstances would not defeat a recovery, and they would be entitled to recover." For the reason that the said instruction was misleading, inapplicable, and

did not correctly state the law in reference to the same. The court allowed the instruction to be given as above set forth and defendant then and there duly excepted and still excepts, which exception was allowed by the court.

The court, continuing, further instructed the jury:

"You are instructed that under the terms of what is called the 'iron-safe clause' of the policy, the plaintiffs bound themselves to keep a set of books showing a complete record of the business
69 transactions of the plaintiffs, including all purchases and sales both for cash and credit, together with the last inventory of their business; and that the plaintiffs further agreed to keep such books and inventory securely locked in a fireproof safe at night and at all times when the store mentioned in the policy was not actually opened for (busines-,) or in some secure place, not exposed to fire which would destroy the house where such business was carried on.

"Now, if the plaintiffs kept such books and inventory locked in a fireproof safe on the night that the goods were destroyed by fire, and the plaintiff- for the purpose of better protecting said books and inventory, attempted to remove them (*from*) some other secure place, not exposed to the fire which would destroy the house in which the business was carried on, and in such effort, any part of the books were destroyed without any fault or carelessness on the part of the plaintiffs, the plaintiffs were acting within the scope of authority granted them by said iron-safe clause of said policy."

Thereupon counsel for defendant objected and excepted to all that portion of the above instructions which is in words and figures as follows, that is to say:

"Now, if the plaintiffs kept such books and inventory locked in a fireproof safe on the night that the goods were destroyed by fire and the plaintiffs for the purpose of better protecting said books and inventory, attempted to remove them to some other secure place, not exposed to the fire that would destroy the house in which the business was carried on, and in such effort any part of the books was destroyed, plaintiffs were acting within the scope of authority granted them by the said iron-safe clause of said policy." For the reason that the said instruction was misleading, inapplicable and does not correctly state the law in reference to the same. The court allowed the instruction to be given as above set forth, and the defendant then and there excepted, and still excepts, which objection was allowed by the court. To each and all and every portion of the said instruction above given defendant then and there excepted and objected as misleading, inapplicable, erroneous, and still excepts, which exception was allowed by the court.

You are, gentlemen of the jury, sole judges of the evidence and of the weight to be given the testimony, and the credit to be given the witness.

You are further instructed that the burden of proof in this case is upon the plaintiffs to make out their case by a preponder-
70 ance of the evidence to the satisfaction of the jury; and as you determine by your deliberation, you will find in your verdict.

Thereupon, before the argument, defendant, by its counsel moved the court to give each of the following instructions to the jury, each of which instructions the court refused to give the jury, and (—) which ruling by the court therein defendant then and there excepted, and still excepts, which exception was by the court allowed:

1. "I instruct you, gentlemen of the jury, under the evidence in this cause the plaintiff is not entitled to recover, and your verdict must be for the defendant." Refused by the court.

2. "I instruct you, gentlemen of the jury, that the policy sued on in this action, numbered 10292, for the sum of $2,500.00, contains the iron-safe clause, which provided, among other things, the assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire, which would destroy the house where such business was carried on; and in case of loss, the assured agrees to produce such books and inventory, and in the event of a failure to produce the same, this policy shall be null and void; and no suit or action at law shall be maintained thereon for any such loss. I further instruct you that this clause of the policy is a warranty on the part of the assured and his failure to meet the requirements of said warranty in any particulars avoids the policy; and the failure by the assured to produce in a case of loss the inventory as required by said warranty would defeat the plaintiffs' right of recovery, and said policy would be null and void.

"Refused by the court."

3. "I instruct you, gentlemen of the jury, that the policy sued on in this action, numbered 10348 for the sum of $1,000.00 contained the iron-safe clause which provided, among other things, "the assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transacted, including purchases and sales, both for cash and credit, together with the last inventory of said business. And further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store men-
71 tioned in the within policy is not actually open for business, or in some secure place not exposed to a fire, which would destroy the house where such business was carried on; and in case of loss the assured agrees and covenants to produce such books and inventory and in the event of a failure to produce the same, this policy shall be null and void, and no suit or action at law shall be maintained thereupon for any such loss. I further instruct you that this clause of the policy is a warranty on the part of the assured, and his failure to meet the requirements of said warranty in any particular, avoids the policy; and the failure by the assured to produce, in case of loss, the inventory as required by said warranty

would defeat the plaintiffs' right to recover and said policy would be null and void." Refused by the court.

Whereupon the jury found in favor of the plaintiffs and against the defendant. And the defendant thereupon, on the 23rd day of September, 1895, filed in the office of the clerk of the United States court a motion for a new trial, which motion for a new trial is in words and figures as follows, to wit, that is to say:

In the United States Court for the Indian Territory, Southern District.

T. K. KEARNEY and J. W. WYSE, Partners as Kearney & Wyse, Plaintiffs,
vs.
THE LIVERPOOL & LONDON & GLOBE INSURANCE CO., Defendant.

Motion for New Trial.

Comes now the defendant The Liverpool & London & Globe Insurance Co., by its attorneys, Quinton & Quinton, and moves the court for a new trial in the above-entitled action.

First. Irregularity in the proceedings of the court, jury, and prevailing party and orders of the court by which the party was prevented from having a fair trial.

Second. The court erred in its instructions to the jury which were excepted to at the time.

Third. The court erred in refusing to give the instructions asked for by the defendant, to which ruling of the court the defendant excepted.

Fourth. That the decision of the court is not sustained by sufficient evidence and is contrary to law.

Fifth. Error of law occurring at the trial and excepted to by the party making the application in admission of evidence.

Sixth. Error in overruling defendant's demurrer to plaintiffs' evidence in that the policy required that the assured agreed
72 to keep a set of books showing a complete record of business transactions including all purchases and sales, both for cash and credit, together with the last inventory of said business, and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night and at all times when the store mentioned in the within policy is not actually opened for business, or in some secure place not exposed to fire which would destroy the house where such business is carried on, and in such case of loss the assured agrees and covenants to produce such books and inventory; and in the event of a failure to produce the same the policy shall be null and void and no suit or action at law shall be maintained thereon for such loss, "it being admitted by the plaintiffs that they did not produce the inventory as required by the policy and the same was destroyed."

Seventh. The court erred in rendering judgment for plaintiffs.

QUINTON & QUINTON,
Att'ys for Defendant.

And thereupon, afterwards, on the said 23rd day of September, 1895, said motion for a new trial being presented to the court upon argument of counsel and same having been duly considered by the court, was overruled; to which ruling by the court defendant then and there duly excepted and still excepts, which exception was by the court allowed.

Whereupon the court rendered judgment upon the verdict of the jury in favor of the plaintiffs against the defendant in this action, and the defendant duly excepted to said judgment rendered by the court upon the verdict of the jury in favor of the plaintiffs, which exception was by the court allowed. Defendant duly excepted to the rendition of said judgment in favor of the plaintiffs against the defendant upon the verdict of the jury, which exception was by the court allowed, and sixty days from the 25th day of September, 1895, was given by the court to the defendant to file *his* bill of exceptions herein.

Whereupon, upon the 5th day of November, upon agreement and good cause shown, and it appearing to the court that further time was needed to file bill of exceptions herein, it was ordered by the court that the time heretofore granted for filing bill of exceptions to the defendant in the above-entitled case be and the same is extended thirty days to and including the 20th day of December.

Whereupon upon the 18th day of December, upon agreement and good cause shown, and it appearing to the court that further time was needed to file bill of exceptions herein, it was ordered by the court that the time heretofore granted for filing bill of exceptions to the above-entitled case be and the same is extended
73 thirty days to and including the 19th day of January.

And now, on this the 16 day of January, 1896, comes the said defendant, The Liverpool & London & Globe Insurance Co., by its attorneys, Quinton & Quinton, and presents to the Hon. C. B. Kilgore, judge of said court, its bill of exceptions as above and the same having been duly examined and considered by him, is signed and allowed and ordered to be placed on file and ordered to be made a part of the records in this case.

And now on this the 5th day of December, 1896, comes the defendant, The London & Liverpool & Globe Insurance Co., and presents this, its bill of exceptions in the above cause, and asked that the same be allowed, signed and made a part of the record in this cause, and that the court order the clerk to file the same as of January 16th, 1896, the date the original bill of exceptions in this cause was presented to the court. The court allows and approves said bill of exceptions as a correct bill of exceptions in said cause, but refuses to direct the clerk to file the same as of said January 16th, 1896, the date upon which the original bill of exceptions was presented to the court, for the reasons given by the court in its answer to the application for writ of mandamus.

Witness my hand this 5th day of December, 1896.

C. B. KILGORE, *Judge.*

UNITED STATES OF AMERICA, }
Indian Territory, Southern District. }

I, Jos. W. Phillips, clerk of the United States court in and for the southern district of the Indian Territory do hereby certify that the above and foregoing is a true, correct, full and complete copy and transcript of the record, bill of exceptions and proceedings in a cause lately pending in said United States court for the southern district at Ryan, wherein Kearney & Wyse, a partnership, composed of T. K. Kearney and J. W. Wyse, were plaintiffs, and The Liverpool & London & Globe Insurance Company was defendant as the same appears of record in my office as such clerk.

In witness whereof I have hereunto set my hand and official seal of said court at Ardmore in said southern district of the Indian Territory.

{ Seal United States Court in the Indian Territory, Southern District, Ardmore. }

JOSEPH W. PHILLIPS,
Clerk of United States Court for the Southern District of the Indian Territory.

74 In the United States Court of Appeals for the Indian Territory.

LIVERPOOL & LONDON & GLOBE INS. CO, Appellant, }
vs.
KEARNEY & WYSE, Appellees. }

Now comes The London & Liverpool & Globe Ins. Co., appellant, and respectfully prays an appeal from the judgment of the United States court for the southern district of the Indian Territory at Ryan, rendered on the 23rd day of September, 1895, in favor of the appellees, Kearney & Wyse, for the sum of $3,500 with interest thereon from the 19th day of April, 1895, and all costs in said cause laid out and expended, and from the order of said court made on said day and date overruling the motion for a new trial filed therein by said appellant who was the defendant below, and from all other orders and judgments made in said cause.

The said appellant, The Liverpool & London & Globe Ins. Co. annexes to this motion a certified copy of all the proceedings in said cause, and prays that the same be filed in this court.

LEDBETTER & BLEDSOE,
Att'ys for Appellant.

Indorsed: "Filed this 8th day of Feb. 1897, and appeal is hereby granted. Fielding Lewis, clerk U. S. court of appeals, Ind. Ter.

And afterwards, to wit, on the 9th day of February, 1897, the said appellant filed his supersedeas bond, which is in the words and figures following, to wit:

In the United States Court of Appeals for the Indian Territory, at South McAlester.

THE LIVERPOOL & LONDON & GLOBE INSURANCE CO., Appellant,
vs.
KEARNEY & WYSE, Appellees.

Whereas, the appellant, The Liverpool & London & Globe Insurance Co., have taken an appeal from the judgment of the United States court for the southern district, Indian Territory, at Ryan, rendered at its September term, 1895, against it, in favor of the appellees, Kearney & Wyse, a firm composed of J. K. Kearney and J. W. Wyse, for the sum of thirty-five hundred dollars with costs, and the appellant desires to supersede said judgment; now, therefore, L. P. Anderson and C. L. Anderson, hereby covenant with the said appellees, that the said appellants will pay the appellees all
75 costs and damages that may be adjudged against the appellant on the appeal, and that *he* will satisfy and perform said judgment in case it shall be affirmed, and any judgment or order which the United States court of appeals for the Indian Territory may render or order to be rendered by the inferior court, the judgment aforesaid.

Witness our hand this the 8th day of February, 1897.

LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.
By its att'ys, LEDBETTER & BLEDSOE.
S. P. ANDERSON.
C. L. ANDERSON.

Indorsed: "Filed and approved Feb. 9th, 1897. Fielding Lewis, clerk."

And afterwards, to wit, on the 2nd day of April, 1897, the following addendum to the original transcript was filed in the office of the clerk of said court, to wit:

United States Circuit Court for the Indian Territory, Southern District.

T. K. KEARNEY and J. W. WISE, Partners as Kearney & Wise, Plaintiffs,
vs.
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendants.

Bill of Exceptions.

Instructions asked and refused and instructions given and the rulings of the court and exceptions thereto relative to the same.

Thereupon, before the argument, defendant, by its counsel, moved the court to give each of the following instructions to the jury, each of which instructions the court refused to give the jury,

and to which ruling by the court therein defendant then and there excepted, and still excepts, which exception was by the court allowed:

1. "I instruct you gentlemen of the jury under the evidence in this cause, the plaintiff is not entitled to recover, and your verdict must be for the defendant." Refused by the court and excepted to by the defendant.

2. "I instruct you, gentlemen of the jury, that the policy sued on in this action, numbered 10292, for the sum of $2,500, contains the iron-safe clause, which provided, among other things, the

76 assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked up in a fireproof safe at night and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business was carried on; and in case of loss the assured agrees to produce such books and inventory, and in the event of a failure to produce the same, this policy shall be null and void, and no suit or action at law shall be maintained thereon for any such loss. I further instruct you that this clause of the policy is a warranty on the part of the assured and his failure to meet the requirements of said warranty in any particular avoids the policy, and the failure by the assured to produce in the case of loss the inventory as required by said warranty would defeat the plaintiffs' right of recovery, and said policy would be null and void." Refused by the court and excepted to by defendant.

3. "I instruct you, gentlemen of the jury, that the policy sued on in this action, numbered 10348, for the sum of $1,000 contained the iron-safe clause, which provided, among other things, 'the assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transacted, including purchases and sales both for cash and credit, together with the last inventory of said business. And further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business was carried on; and in case of loss the assured agrees and covenants to produce such books and inventory and in the event of a failure to produce the same, this policy shall be null and void, and no suit or action at law shall be maintained thereon for any such loss.' I further instruct you that this clause of the policy is a warranty on the part of the assured and his failure to meet the requirements of said warranty in any particular, avoids the policy; and the failure by the assured to produce, in case of loss, the inventory as required by said warranty would defeat the plaintiffs

right to recover and said policy would be null and void." Refused by the court and excepted to by the defendant.

And thereupon the court instructed the jury on matters of law pertaining to said case, and refused certain instructions
77 asked by the defendant, and exceptions were saved to the portions of such instructions given and are as follows, to wit, that is to say:

Instructions to the Jury.

No. 1. Statement of the facts of the case as agreed to by both parties.

In this case the plaintiffs sue the defendant for thirty-five hundred dollars, alleged to be due by reason of two insurance policies executed by the defendant, one for the sum of one thousand dollars, executed February 11, 1895, and one for the sum of $2,500, executed June 15, 1894. The defendants deny their liability under said policies, and claim that the plaintiffs failed to comply with the terms of said policy, in that the plaintiffs were not the sole owners of the property insured, and that they did not give immediate notice of their loss in writing to the company, that they did not make satisfactory proofs of loss to said company within sixty days after the fire, and that they did not keep a set of books showing a complete record of the business transactions, including all purchases and sales, both for cash and credit, together with the last inventory of said business, and that they failed to keep such books and inventory in a fireproof iron safe, as required by said policies, and have failed to produce the records and books as required by said policies as requested by the defendant company; and failed and refused to produce the inventory as required by said policies and requested by the defendant.

That is a statement of the allegations of the plaintiffs' cause of action and of the defendant's grounds of defense, which is agreed upon by counsel upon both sides, and which precipitates the issue between them.

The principal question you are called upon to determine in this case, and about the only question of fact, material question of fact, is, whether under this policy the plaintiffs, Kearney & Wyse, have in the main complied with the terms of the policy.

Under the exact terms of that policy, and the exacting terms of it, I may add, they were required to keep a complete set of books by which they could exemplify every day's transaction of their business; and they were required to keep a book containing an inventory last made by the plaintiffs before the fire. They have produced a set of books, an explanation of which you have heard made by the plaintiffs, and which seem to be substantially in compliance with the terms of the policy upon that subject.

"The controversy arises over a missing book, the book containing the last inventory that was taken of their stock
78 before the fire. The policy required that they should deposit these books in an iron safe for protection, or in some other

safe place. Now if they had been guilty of negligence in the discharge of that duty, in the discharge of the obligation imposed by the policy, they would not be entitled to recovery and that is a question you must pass upon. It is contended by the plaintiffs that when the fire was on, a great fire, sweeping a whole town out of existence, in order to protect their records and books in accord with the obligations which this policy imposed upon them, they opened the safe and took from it what they supposed to be all the books relating to the business. It is contended that in the act of removal of those books to a safer place (or what seemed to have been the purpose of the plaintiffs in that regard) the book about which this contention exists was lost. If it was in the safe, and in taking it out it was lost in the excitement and destroyed, you are instructed that the loss or destruction of that book and the failure to produce it, would not in itself defeat a recovery. If there was a fraud perpetrated in its loss or destruction, or the parties were guilty of any negligence, or a want of due care under the circumstances, when the book was lost, that would be sufficient to defeat a recovery; but if they acted in good faith, with the use of diligence and care that business men usually employ, the loss of that book under the circumstances would not defeat a recovery, and they would be entitled to verdict."

Thereupon counsel for defendant objected and excepted to all that portion of the above instruction which is in words and figures as follows, that is to say:

"Now, if they had been guilty of negligence in the discharge of that duty, in the discharge of the obligation imposed by the policy, they would not be entitled to recover; and that is a question you must pass upon. It is contended by the plaintiffs that when the fire was on, a great fire, sweeping a whole town out of existence, in order to protect their records and books in accord with the obligations which this policy imposed upon them, they opened the safe and took from it what they supposed to be all the books relating to the business. * * * If it was in the safe, and in taking it out it was lost in the excitement and destroyed, you are instructed that the loss or destruction of that book and the failure to produce it, would not in itself defeat a recovery. If there was a fraud perpetrated in its loss or destruction, or the parties were guilty of any negligence, or a sufficient want of care under the circumstances, when the book was lost, that would be sufficient to defeat a recovery. But if they acted in good faith, with the use of diligence and care that
79 business men usually employ, the loss of that book under the circumstances would not defeat a recovery, and they would be entitled to recover." For the reason that the said instruction was misleading, inapplicable, and did not correctly state the law in reference to the same. The court allowed the instruction to be given as above set forth, and defendant then and there duly excepted, and still excepts, which exception was allowed by the court.

The court, continuing, further instructed the jury:

"You are instructed that under the terms of what is called the

iron-safe clause of the policy, the plaintiffs bound themselves to keep a set of books, showing a complete record of the business transactions of the plaintiffs, including all purchases and sales both for cash and credit, together with the last inventory of their business; and that the plaintiff further agreed to keep such books and inventory securely locked in a fireproof safe at night and at all times when the store mentioned in the policy was not actually opened for business, or in some secure place not exposed to fire which would destroy the house where such business was carried on.

"Now, if the plaintiffs kept such books and inventory locked in a fireproof safe on the night that the goods were destroyed by fire, and the plaintiffs for the purpose of better protecting said books and inventory, attempted to remove them (*from*) some other secure place, not exposed to the fire which would destroy the house in which the business was carried on, and in such effort any part of the books were destroyed, without any fault or carelessness on the part of the plaintiffs, the plaintiffs were acting within the scope of authority granted them by said iron-safe clause of said policy."

Thereupon counsel for defendant objected and excepted to all that portion of the above instruction which is in words and figures as follows, that is to say:

"Now if the plaintiffs kept such books and inventory locked in a fireproof safe on the night that the goods were destroyed by fire and the plaintiffs for the purpose of better protecting said books and inventory, attempted to remove them to some other secure place, not exposed to the fire that would destroy the house in which the business was carried on, and in such effort any part of the books were destroyed, without any fault or carelessness on the part of the plaintiffs, the plaintiffs were acting within the scope of authority granted them by the said iron-safe clause of said policy." For the reason that the said instruction was misleading, inapplicable, and does not correctly state the law in reference to the same. The court allowed the instruction to be given as above set forth, and the defendant then and there excepted, and still excepts, which objection
80 was allowed by the court. To each, and all, and every portion of the said instruction above given, defendants then and there excepted and objected as misleading, inapplicable, erroneous, and still except, which exception was allowed by the court.

"You are, gentlemen of the jury, sole judges of the evidence, and of the weight to be given to the testimony, and the credit to be given the witnesses.

"You are further instructed that the burden of proof in this case is upon the plaintiffs to make out their case by a preponderance of the evidence and to the satisfaction of the jury; and as you determine by your deliberations you will find in your verdict."

Whereupon the jury found in favor of the plaintiff- and against the defendant. And the defendant thereupon, on the 23rd day of September, 1895, filed in the office of the clerk of the United States court a motion for a new trial, which motion for new trial is in words and figures as follows, to wit, that is to say:

United States Circuit Court for the Indian Territory, Southern District.

T. K. KEARNEY and J. W. WISE, Partners as Kearney & Wise, Plaintiffs,
vs.
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendants.

Motion for New Trial.

Comes now the defendant, The Liverpool and London and Globe Insurance Company, by its attorneys, Quinton & Quinton, and moves the court for a new trial in the above-entitled action.

First. Irregularity in the proceedings of the court, jury, and prevailing party, and orders of the court by which the party was prevented from having a fair trial.

Second. The court erred in its instructions to the jury, which were excepted to at the time.

Third. The court erred in refusing to give the instructions asked for by the defendant, to which ruling of the court the defendants excepted.

Fourth. That the decision of the court is not sustained by sufficient evidence, and is contrary to law.

Fifth. Error of law occurring at the trial and excepted to by the party making the application in admission of evidence.

Sixth. Error in overruling defendant's demurrer to plain-
81 tiffs' evidence, in that the policy required that "the assured agrees to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to fire which would destroy the house where such business is carried on, and in case of loss the assured agrees and covenants to produce such books and inventory; and in the event of a failure to produce the same, the policy shall be null and void, and no suit or action at law shall be maintained thereon for such loss," it being admitted by the plaintiffs that they did not produce the inventory as required by the policy and the same was destroyed.

Seventh. The court erred in rendering judgment for plaintiffs.

(Signed) QUINTON & QUINTON,
Attorneys for Defendant.

And thereupon, afterwards, on the said 23rd day of September, 1895, said motion for new trial being presented to the court upon argument of counsel, and same having been duly considered by the court, was overruled; to which ruling by the court defendant then

and there duly excepted and still excepts, which exception was by the court allowed.

Whereupon, the court rendered judgment upon the verdict of the jury in favor of the plaintiffs against the defendant in this action and the defendant duly excepted to said judgment rendered by the court upon the verdict of the jury in favor of the plaintiffs, which exception was by the court allowed. Defendants duly excepted to the rendition of said judgment in favor of the plaintiffs against the defendant upon the verdict of the jury, which exception was by the court allowed and sixty days from the 25 day of September, 1895, was given by the court to the defendant to file his bill of exceptions herein.

Whereupon, upon the 15th day of November, upon agreement and good cause shown and it appearing to the court that further time was needed to file bill of exceptions herein, it was ordered by the court that the time heretofore granted for filing bill of exceptions to the defendant in the above-entitled case be, and the same is extended thirty days to and including the 20th day of December.

Whereupon, upon the 18th day of December, upon agreement and good cause shown, and it appearing to the court
82 that further time was needed to file bill of exceptions herein, it was ordered by the court that the time heretofore granted for filing bill of exceptions to the defendant in the above-entitled case be, and the same is extended thirty days to and including the 18th day of January.

And now, on this the 16th day of January, 1896, comes the said defendant, The Liverpool and London and Globe Insurance Company, by its attorneys, Quinton & Quinton, and presents to the court its bill of exceptions as above.

STATE OF KANSAS, }
County of Shawnee, } *ss*:

I, M. W. Van Valkenburg, being first duly sworn, depose and say: That I was present during the trial of the case of Kearney & Wise *vs.* The Liverpool and London and Globe Insurance Company before his honor, Judge C. B. Kilgore, and that I have carefully read the foregoing bill of exceptions and the same are a true and correct record of the proceedings had and held before his honor, Judge Kilgore, in the trial of said case.

That the said instructions herein presented were presented to his honor and asked by the attorneys to be given to the jury and the court refused the same; to which order and ruling by the court and each, and every one of them, counsel for defendant, The Liverpool and London and Globe Insurance Company then and there excepted and the court allowed the exceptions to all rulings of the court and particularly to the instructions asked for by the defendant company.

Furthermore, that counsel for defendant, The Liverpool and London and Globe Insurance Company, objected particularly as herein set out to the instructions given by the court to the jury in

the trial of said cause and that said objections of counsel were overruled, to which ruling counsel then and there excepted and said exceptions were allowed by the court.

That the bill of exceptions hereto attached *are* a true and correct record of the proceedings had at the trial of said case.

M. W. VAN VALKENBURG.

Subscribed and sworn to before me, this 17 day of February, 1897.

[M. M. Hempstead, Notary Public, Shawnee County, Kans.]

M. M. HEMPSTEAD,
Notary Public.

My commission expires Jan'y 24, 1899.

STATE OF KANSAS, } ss:
County of Shawnee, }

I, E. S. Quinton, being first duly sworn, depose and says:

That I was present during the trial of the case of Kearney & Wise *vs.* The Liverpool and London and Globe Insurance
83 Company before the Hon. Judge C. B. Kilgore and that I have carefully read the foregoing bill of exceptions and the same *are* a true and correct record of the proceedings had and held before his honor, Judge Kilgore, in the trial of said case.

That the said instructions herein presented were presented to his honor and asked by the attorneys to be given to the jury, and the court refused the same; to which order and ruling by the court, and each and every one of them, counsel for defendant, The Liverpool and London and Globe Insurance Company then and there excepted, and the court allowed the exceptions to all rulings of the court, and particularly to the instructions asked for by the defendant company.

Furthermore, that counsel for defendant, The Liverpool and London and Globe Insurance Company objected particularly as herein set out, to the instructions given by the court to the jury in the trial of said cause, and that said objections of counsel were overruled, to which ruling counsel then and there excepted, and said exceptions were allowed by the court.

That the bill of exceptions hereto attached *are* a true and correct record of the proceedings had at the trial of said case.

E. S. QUINTON.

Subscribed and sworn to before me this 17 day of February, 1897.

[M. M. Hempstead, Notary Public, Shawnee County, Kans.]

M. M. HEMPSTEAD,
Notary Public.

My commission expires Jan'y 24, 1899.

UNITED STATES OF AMERICA, }
Indian Territory, Southern District. }

I, Jos. W. Phillips, clerk of the United States court for the southern district of the Indian Territory do hereby certify that the above and foregoing is a true and correct copy of the addendum to the bill of exceptions filed in my office on the 20th day of March, 1897.

{ United States Court in the Indian Territory, }
{ Southern District, Ryan. }

JOSEPH W. PHILLIPS,
Clerk of United States Court, Southern District, Indian Territory.
By H. F. COLLIER.

Indorsed: "Filed April 2, 1897. Fielding Lewis, clerk."

And afterwards, to wit, the chief justice of said court made the following entry on his docket:

"June 5th, 1897.—It is agreed that the record in the mandamus case may be considered in this case."

84 Which said record mentioned is in the words and figures following, to wit:

In the United States Court of Appeals in and for the Indian Territory.

KEARNEY & WISE, Plaintiffs,
vs.
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant.

Affidavit.

STATE OF KANSAS, }
County of Shawnee, } *ss:*

I, E. S. Quinton, being first duly sworn, on oath depose and say: That I am the attorney in and tried the above-entitled cause before his honor, Judge Kilgore, in the United States court of the Indian Territory; and at the trial of said case and at the conclusion thereof the court allowed time in which to make and serve a bill of exceptions in the same in conformity to the opportunity or the time that the stenographer taking down the case would have to furnish us the evidence and instructions of the court; the time being given us upon a statement made that we would prefer the stenographer, who was the court stenographer, to make up the bill of exceptions and write out the evidence, as there then could be no question about the same; and the court, for the purpose of allowing the stenographer to do that, gave the time as asked. That we immediately employed the stenographer to make the record, a complete and full transcript of all the proceedings had at the trial

of the case, and furnish them to us, that we might serve them within the time allowed.

And further state: That the said stenographer, being unable to furnish us with a transcript of the proceedings and evidence had at the trial of said case, at his own request and for his benefit, and not on account of any act or neglect or delay or negligence of our own, requested further extension of the time in which to prepare the same from the court and from the opposing counsel and the same was obtained by the said stenographer. That in said extension of time the said stenographer was unable to prepare his record and furnish us with the evidence, as required, on account of meeting with an accident, and got a further extension of time at his own request, and not upon any fault or neglect of our own in preparing the bill of exceptions to be filed in this case. That said two extensions of time were so granted, and it is now my opinion that a third extension of time was granted at the request of said stenographer and entirely at his own instance and for his in-
85 terest, he being unable, on account of the accident, to furnish a transcript of the evidence for the purpose of making the bill of exceptions, without any fault or neglect or delay upon our part. And the same was continued until the evidence was furnished us by the stenographer. Upon the middle of January we received the evidence as written, our time expiring, as my recollection now serves me, upon the 12th day of January. The time being so short, unless some delay should happen, that a further extension should be asked, in order to have the bill of exceptions signed, I telegraphed to Ardmore to learn where I would be able to find Judge Kilgore. I ascertained that I would be able to find him in Ardmore.

Pursuant thereto, I went from Topeka to Ardmore, a distance of 500 or 600 miles, taking the bill of exceptions with me in order to present them to Judge Kilgore for signing within the time allowed.

While en route to Ardmore, I received a telegram that I would find Judge Kilgore at South McAlester. I then crossed the country to South McAlester, and found upon arriving there that Judge Kilgore had left the night before for Washington, D. C., the supreme court of the Indian Territory then being in session. I arrived in South McAlester on Monday night, I think, the 14th day of January. I went immediately to see Judge Kilgore, but learned from Mr. Cruce at the hotel and from Judge Lewis of the supreme court, that Judge Kilgore had gone to Washington. I then presented the matter to Mr. Cruce, telling him that I had come all of this distance for the purpose of having the bill of exceptions filed within time, and that no fault or delay could be laid at my door, and requested him to consent that they be signed or the time be extended, that I would not have time to get to Washington before the time expired, to see Judge Kilgore. Mr. Cruce informed me then that he would do nothing of the kind. That he believed we had him beaten, and if there was anything he could do to keep us from going to the supreme court, he was going to do it. It was a pretty close question any way. Whereupon Judge Lewis remarked to me that I had been to a good

deal of trouble and done all I could do, and was there in plenty of time to have the bill of exceptions signed, if Judge Kilgore had been within his district; and gave me the address of Judge Kilgore, in Washington, stating to me to have the record expressed to Judge Kilgore at Washington, which would reach him within the time, and to take a receipt from the express company for the record, saying that the record had been sent to Judge Kilgore within the time. And that I certainly ought not be denied the privilege of having my bill of exceptions signed within the time when I had come so far for the sole purpose of having it done, and within the time
86 to have it done, if Judge Kilgore had been within the district. Consequently I expressed the record to Judge Kilgore at Washington, and wrote him a letter stating that I had done so, and I hoped that the record would be signed, and stating to him also that I had come from Topeka, Kansas, to South McAlester and Ardmore for the purpose — having him sign the same within the time allowed. And further deponent saith not.

E. S. QUINTON.

Subscribed and sworn to before me this 7th day of April, 1896.

[SEAL.] M. M. HEMPSTEAD,
Notary Public.

My commission expires January 24, 1899.

Indorsed: "Filed June 5, 1896. Fielding Lewis, clerk."

In the United States Court of Appeals for the Indian Territory, at South McAlester.

KEARNEY & WYSE, Plaintiffs,
vs.
THE LONDON & LIVERPOOL & GLOBE INSURANCE COMPANY.

Return to Alternative Writ.

Comes now the respondent, C. B. Kilgore, and states that he ought not to be compelled to respond to the alternative writ issued herein for the reason that the petition for mandamus is insufficient in this:

That it does not contain a transcript of the proceedings in the case below; neither does it contain a copy nor a substantial copy of the bill of exceptions which it is alleged was presented to this respondent for his signature.

Second. Should the court decide that the petition should be answered by this respondent, then he says that at a regular term of the United States court for the southern district of the Indian Territory, held at Ryan, which began on the 16th day of September, 1895, and ended on the — day of September, 1895, on the 25th day of said month, the defendant, The London and Liverpool and Globe Insurance Company, was given sixty days from said date in which to prepare and file its bill of exceptions. On the 15th day of November, 1895, upon agreement of counsel for the respective parties, the time

for preparing and filing the bill of exceptions was extended to the 20th day of December, 1895; that upon the 18th day of December, 1895, upon further agreement between counsel the time for preparing and filing the bill of exceptions was extended thirty days, including the 18th day of January, 1896.

Respondent states that it is the practice of the court over which he presides, amounting to a rule of the court and known to
87 all attorneys practicing in said court, that exceptants desiring the signature of the trial judge to bills of exceptions shall first before presenting bills of exceptions to the trial judge for signature present the same to the opposing counsel for their inspection. In the case at bar no bill of exceptions was ever presented to respondent until the 18th day of January, 1896, which was not signed by this respondent for the following reasons:

The official stenographer of the trial court, Willard Bleakmore, at the instance of the London and Liverpool and Globe Insurance Company, prepared an accurate transcript of all the proceedings upon the hearing of said cause, and delivered the same to the attorneys of the defendant in Topeka, Kansas, on the 24th day of December, 1895, twenty-five days before the expiration of the time for settling and filing the bill of exceptions. This respondent remained in the Indian Territory in the discharge of his official duties until the 11th day of January, 1896, when he was called to the city of Washington upon business connected with his official duties. No bill of exceptions of any kind was tendered to this respondent until the 18th day of January, 1896, the day upon which the time for filing the bill of exceptions expired, when he received by express what purported to be a correct bill of exceptions in the case. The bill of exceptions so presented was not a correct bill of exceptions. It had never been presented to opposing counsel for inspection, but the attorneys for defendant had eliminated from the transcript furnished them by the stenographer portions of the record which show the charges of the trial court, and exceptions thereto, and inserted in lieu thereof eleven typewritten pages which contained other and different things from what occurred in the trial of the cause, and which was in nowise a correct and accurate bill of exceptions.

This respondent had no way to examine the official report of the case for the purpose of preparing a correct bill of exceptions and he refused to sign the purported bill presented to him for the reason that it was inaccurate. No other or different bill of exceptions was ever presented to this respondent for his signature. The London and Liverpool and Globe Insurance Company, after receiving from the stenographer a correct transcript of the proceedings had upon the trial of the cause had ample time in which to present the same to this respondent for his signature before the expiration of the time given. Through no fault of this respondent, but through the fault of the attorneys for the defendant he was prevented from signing a correct bill of exceptions in this cause within the time limited by the order of the court.

88 Respondent was willing to sign a correct bill of exceptions in this cause, and would have signed the same had it been presented to him within the time fixed by order of the court, but he lost jurisdiction of the matter after the 18th day of January, 1896.

C. B. KILGORE,
Judge S. Dist. I. T.

KEARNEY & WISE, Plaintiffs,
vs.
LIVERPOOL, LONDON AND GLOBE INS. CO.

We think the bill of exceptions should not be signed, for the following reasons:

The time for filing the bill of exceptions expired on January 19, 1896; the court stenographer made a perfect transcript of the record and sent it to the attorneys for the defendant, at Topeka, Kansas, by register; the return register receipt shows that the record was received by the attorneys on December 28, 1895; Judge Kilgore was in the Indian Territory for nearly three weeks after this date, and the attorneys had ample time to present the record to the judge for his examination and approval. Instead of presenting the record as prepared for them by the stenographer, the attorneys removed that portion of the record containing the charge of the court and exceptions thereto, and inserted some ten pages of typewritten matter prepared by themselves. The record, as thus amended by the attorneys for the defendant, was not a correct record in the case. The bill of exceptions, even as amended by defendant, was never submitted to counsel for Kearney & Wyse, for their examination, but was sent to the judge, at Washington city, and reached him one day before the expiration of the time for filing the bill of exceptions. It was solely the (*cause*) of appellant's counsel that a proper bill of exceptions was not presented to the judge within the time allowed by order of the court for signing and filing the same.

A. C. CRUCE, *Att'y Pl'ff.*

I received the bill of exceptions in the above cause in Washington, D. C., on the 18th day of Jan., 1896, and declined to approve the same for the reasons above alleged, and for the further reason that it had never been presented to the plaintiffs for their investigation and approval. I retained said bill of exceptions from said date until today under advisement and herewith return the same to the attorneys for the defendant without my approval, for the reasons above stated.

This May the 29th, 1896.

C. B. KILGORE, *Judge.*

Indorsed: "Filed May 29, 1896. J. W. Phillips, clerk."

89

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RETURN TO:

Name of Sender, W. R. Blakemore.

Street and Number, or Post Office Box, ...

Post Office at Ardmore,

County of ..... State of I. T.

Form 1548.

REGISTRY RETURN RECEIPT, sent 12 24, 1895.

Reg. No. 473, from Post Office at Ardmore.

*[Reg. Letter] / Reg. Parcel } Addressed to Mess. Quinton & Quinton,

Topeka, Kan.

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED *LETTER. / PARCEL.

(Sender's name on other side.)

SIGN ON DOTTED LINES TO THE RIGHT.

Quinton & Quinton,

By A. B. Quinton.

When delivery is made to other than addressee, the name of both the addressee and recipient must appear.

* Erase letter or parcel according to which is sent.

[* Words enclosed in brackets erased in copy.]

In the United States Court of Appeals for the Indian Territory, at South McAlester.

KEARNEY & WYSE, Plaintiffs,
vs.
THE LONDON AND LIVERPOOL AND GLOBE INSURANCE COMPANY.

W. R. Bleakmore, being duly sworn, says that he is the stenographer who made a transcript of the proceedings upon the
90 trial of the above-entitled cause at Ryan, Indian Territory; that he made a true transcript of such proceedings, including

the testimony adduced upon said trial, the instructions asked by plaintiff and defendant, given and refused, and the instructions given by the court of its own motion, and the exceptions thereto in full, and mailed the same to the attorneys for defendant to be used in a bill of exceptions in said cause; that the affiant has examined the bill of exceptions presented to the judge of the trial court for approval, and that only the testimony and exhibits thereto as furnished by him in the original transcript sent said attorneys is contained in said bill of exceptions, and that some eleven pages of typewritten matter (*has*) been added containing certain exceptions never taken upon the trial of said cause.

W. R. BLEAKMORE.

Subscribed and sworn to before me this 5th day of June, 1896.

FIELDING LEWIS, *Clerk.*

United States Court, Indian Territory.

KEARNEY & WYSE, Plaintiffs,
vs.
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant. } 64.

STATE OF KANSAS, }
County of Shawnee, } *ss:*

I. E. S. Quinton, being first duly sworn, on oath depose and say: That I was the attorney conducting and trying the case for the defendant, Kearney & Wyse *vs.* The Liverpool & London and Globe Insurance Company, before his honor, C. B. Kilgore, at Ryan, Indian Territory; and after the trial of said cause, the court made inquiry of the stenographer when he thought he would be able to write out the evidence taken in the case and give the same to me for the purpose of making a bill of exceptions in same. A certain time was fixed, for which I left order with the stenographer, Mr. Bleakmore, to prepare me the evidence as quickly as he could possibly do so, so that I could prepare the bill of exceptions while the case was fresh in the minds of both the court and ourselves.

I am under the impression that the time expired about the last of November. I know that nearly at the expiration of the time I had not heard from Mr. Bleakmore, and I wired him, calling his attention to the fact that the time was nearly expired, and asking him how he progressed in writing out the evidence. He answered me that he would be unable to get the evidence in time and would have to get an extension of time. I then wired him, asking him, as it was not our fault, to please see his honor, Judge Kilgore, and explain to him himself that it was by reason of his inability
91 to get out the evidence, and for him to make the request for extension of time; that the delay had arisen, not on account of us, but on account of his inability to furnish the evidence. Mr. Bleakmore at Ardmore, Indian Territory, telegraphed me as follows:

"Can't get record out in time. Send agreement to extend thirty days. Will have order made.

W. R. BLEAKMORE."

Believing that the time was too short to get an extension from this end of the line, we wired Mr. Bleakmore immediately (but have not got a copy of that telegram), that as long as it was due to his inability that the record was not out, and not our fault, that we wished he would go to the court and see his honor, Judge C. B. Kilgore, and so explain it to him and get such extension of time as would allow him to prepare us the evidence as was requested; and that I would not have time to prepare one here and send it; that if I should, the court might not understand it; and that if he explained to him that the record was not out on account of his inability to get it, of course the court would have no objections to giving him further time, as it would not be our fault. To which upon November 14th, the same day, I received the above telegram; and after I had telegraphed him, I received another telegram from Mr. Bleakmore, saying:

"Will have agreement signed for you and order made.

W. R. BLEAKMORE."

Dated Ardmore, Indian Territory, Nov. 14, 1895.

On November 18th, being uneasy as to whether or not the proper order had been made and the time had been secured for him to prepare the evidence for us, I wired him again, asking him if he had obtained an extension of the time from the court for writing out the evidence; to which he answered me November 18:

"PURCELL, INDIAN TERRITORY.

"I have order made as you suggest, and filed.

W. R. BLEAKMORE."

On December 4th, we had not yet heard from the evidence, and we wrote Mr. Bleakmore as follows:

"DEC. 4, 1895.

W. R. Bleakmore, Ardmore, Indian Territory.

DEAR SIR: Can you not furnish us the evidence in the case of (*of*) Kearney & Wyse *vs.* The Liverpool and London and Globe Insurance Company immediately, as we are afraid that the time will be short on us again. We do not want to weary the patience of the court, and we would like to get this case progressing towards
92 the court of appeals. Please furnish this as soon as possible. We would like to have it this week, as the time is now drawing near again for completion of this case on extension, and we do not like to ask another extension of the matter.

Very truly, QUINTON & QUINTON."

And not hearing from this communication, I again wrote on December 11:

"DEC. 11, 1895.

W. R. Bleakmore, Ardmore, Indian Territory.

DEAR SIR: Please let us hear from you as to how you are progressing with the case of Kearney & Wyse *vs.* The Liverpool and London and Globe Insurance Company. Our time is short and we are quite anxious to have it as soon as possible. Please let us know how soon we may have it and oblige—

Yours very truly, QUINTON & QUINTON."

On December 12 I received from Mr. Bleakmore, in answer to the communication, the following communication, dated—

"PAUL'S VALLEY,
INDIAN TERRITORY, *December* 12, 1895.

Mess. Quinton & Quinton, Topeka, Kans.

GENTLEMEN: I had the record almost complete in your case when I was badly ruptured at Purcell, the day I telegraphed you. I have been in bed ever since until a day or so ago, and have been unable to do any work whatever. Send me agreement such as you desire for extension of thirty days more time, and I will have it signed and filed. The best practice is to make agreement that bill of exceptions be signed *nunc pro tunc*. I will get the transcript to you the first of next week.

Yours truly, W. R. BLEAKMORE,
Stenographer."

On the 18th I wired (*them*), a copy of which telegram I have not got, neither can I obtain it from the telegraph office, in answer to which I received from him the following communication, with the agreement enclosed, dated—

"PAUL'S VALLEY,
INDIAN TERRITORY, *December* 18, '95.

Mess. Quinton & Quinton, Topeka, Kans.:

Your telegram reached me yesterday. I have prepared agreement and order for extension of time in insurance case, a copy of which I enclose herewith. The agreement is all that is necessary, but I added the order as you appeared to desire it. The judge understands fully that I am the sole cause of the delay in the matter. The plaintiffs kicked about signing agreement, but did so on my account. I signed for you.

93 I have the transcript about completed and have had for some time, but was unable to do anything with my work until the last few days. I will send transcript to you, that transcript of the evidence, exhibits, etc., by Tuesday or Wednesday. I have written the clerk of the court at Ryan to send the copy of record to you at Topeka, and it will reach you by that time also. I know you had a copy of the instructions, but I will add them also, in case your copy should have been misplaced or lost.

Yours very truly, W. R. BLEAKMORE."

Agreement.

"In the United States Court in the Indian Territory, Southern District, at Ryan.

KEARNEY & WYSE, Plaintiffs,
vs.
THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY.

It is agreed between the parties hereto that the time for making up and filing the bill of exceptions and perfecting the appeal herein may be extended thirty days from the date hereof, for the reason that the court stenographer has been sick and unable to furnish the transcript of the evidence given in said cause.

It is further agreed that said bill of exceptions may be filed at any time within the next thirty days as of the time originally granted by the court within which to file said bill of exceptions.

——— ———,
Att'ys for Plaintiffs.

——— ———,
Att'ys for Def't Company.

In accordance with the above agreement it is hereby ordered by the court that the time heretofore granted in this case for the filing of the bill of exceptions herein be extended thirty days from the date hereof.

Dated this 18th day of December, 1895.

——— ———, *Judge.*"

On December 24th I received from him the following communication:

"ARDMORE, IND. TER., *Dec.* 24, 1895.

Mess. Quinton & Quinton, Topeka, Kans.

GENTLEMEN: I herewith enclose transcript of evidence, exhibits, and instructions, both given and refused, in the case of
94 Kearney & Wyse *vs.* The Liverpool & London & Globe Insurance Co. I have hurried this transcript the last few days, so that you might, if desired, get into the appellate court in time for a decision next month. You have nearly thirty days yet in which to file the bill of exceptions, as you know.

The agreement which I sent you, together with the order of the court, is the best manner of extending time; by that means, no advantage can be taken of you by reason of the delay.

The bill for transcript in this case amounts to about $50.00. However, I cut it down to $42.50, and have taken the liberty of drawing on you for that amount, as I have been sick a long time, and am in need of the money. And then your Mr. Quinton who was at Ryan told me to make such draft and to draw on you at any time for 'sweetening.' I forebore the 'sweetening' but made the draft.

Yours very truly, W. R. BLEAKMORE.

Put transcript together loosely, knowing you would have to take it apart."

On January 4th we wrote Mr. Bleakmore as follows:

"JAN. 4, 1896.

W. R. Bleakmore, Ardmore, I. T.

DEAR SIR: On our return this morning, we discovered that in our absence a draft has been made on us here for your bill for the case against the insurance company, and we write you now lest you may feel that some discourtesy was shown in not attending to the draft, but as we did not know of it until after it was returned, of course, we could not. We will be in Ardmore next week in all probability. If not, we will remit it in settlement of the case.

Thanking you for your attention to the matter, and assuring you that we will either see you in person or remit it next week, we are,

Yours very truly, QUINTON & QUINTON."

At that time we wired also Mr. Bleakmore, who was the stenographer of the court, to ascertain whether we would be able to reach Judge Kilgore. In reply to which he informed us that he was in So. McAlester, but would be in Ardmore the last of the week to spend Sunday.

I then took the bill of exceptions as I had made them, and the evidence and instructions, and started for Ardmore, Indian Territory, for the purpose of reaching Judge Kilgore at his home and having the same settled.

95 On Sunday night, however, I received a telegram from Mr. Bleakmore that Judge Kilgore would go to So. McAlester Sunday. I went, however, to Ardmore and found that Judge Kilgore had gone to South McAlester. I returned to Oklahoma City and went from there to So. McAlester, reaching there Monday night, and found that Judge Kilgore had left there that day (or the day before) for Washington, D. C. I had the bill of exceptions with me and learned that Judge Kilgore had left for Washington, D. C., from his honor Judge Lewis at the hotel and Mr. Cruce.

I stated to Mr. Cruce that I was considerably disappointed. I had come a good ways for the purpose of getting the bill of exceptions surely signed and settled within the time, and asked him if there was not some arrangement we could make about the matter. Judge Kilgore was in Washington, and we had plenty of time in which to present the bill of exceptions if he was in his jurisdiction or if we could reach him. To which Mr. Cruce asked me if I had the bill of exceptions with me. I then, having it in my hand, handed it to him for his examination. He cursorily looked through the same, and at the end found and discovered that our time expired January 19. This was on Monday evening I think, the 14th day of January (either the 13th or 14th day of January).

I asked him again if there was not some way that we could agree to settle this matter, as Judge Kilgore was out of the country, so that this appeal could be perfected, as I had come with the record

as soon as I could get it and properly prepared it, to which he replied: "No, sir, he would be darned if he would do anything to help us get an appeal in that case; that there was a pretty close question of law in there, and if there was any way he could prevent me getting a rehearing of the case he was going to do it." I remarked to him that I did not think that was fair; that we ought to certainly have a hearing in the matter, and if he was right the court would decide his way, and if he was wrong of course I ought to have the case reversed, and tried to persuade him to enter into some kind of a stipulation or agreement whereby the case could be appealed on account of Judge Kilgore's absence, which he emphatically refused to do, stating again that if there was any way he could prevent us from getting a rehearing in the case he was going to do it. Mr. Bledsoe was present and heard this conversation, likewise his honor Judge Lewis was sitting there and heard the same. At that he handed me back the record, stating that he would not accept it and would have nothing to do with it, that he would not sign it nor agree to anything. He could not afford to take that chance. To which Judge Lewis remarked to me that I had
96 apparently done everything that I could, and was down there with the bill of exceptions to have it signed within sufficient time, and made the suggestion that I take the bill of exceptions down to the express office and express it to Judge Kilgore, Washington, D. C. I thanked him for his advice and immediately went to the express office and expressed the record to Washington, care of D. B. Culberson to his honor Judge C. B. Kilgore, which receipt is dated January 14, 1896.

And further deponent saith not.

E. S. QUINTON.

Subscribed and sworn to before me this 27th day of June, 1896.

[SEAL.] M. M. HEMPSTAED,
Notary Public.

My commission expires January 24, 1899.

And afterwards, to wit, on the 5th day of June, 1897, it being the fifth day of the regular June term, 1897, of said court, the following further proceedings were had and made of record, to wit:

L. & L. & G. Ins. Co.
vs.
Kearney & Wyse.

This case is this day submitted to the court on the transcript of the record herein and the briefs and oral arguments in behalf of each party hereto. And it is ordered that the record filed in the mandamus case, numbered 64, on the docket of this court may be used herein.

And afterwards, to wit, on the 14th day of June, 1898, the United States court of appeals handed down its opinion in said cause which is in the words and figures following, to wit:

In the United States Court of Appeals in the Indian Territory.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, Appellants, *vs.* KEARNEY & WYSE, Appellees.	No. 106.

Appeal from the United States court for the southern district of the Indian Territory, sitting at Ryan, Hon. C. B. Kilgore, judge.

Statement.

This was a suit filed on July 15, 1895, in the United States court for the southern district of the Indian Territory at Ryan, by
97 Kearney & Wyse, a partnership, composed of T. K. Kearney and J. W. Wyse, against the Liverpool and London and Globe Insurance Company, upon two fire insurance policies, aggregating the sum of $3,500.

The plaintiffs alleged the issuance of the policies, the value of the property insured, its destruction by fire, the liability of the defendant in consequence thereof, and that "copies of said policies are hereto annexed and made a part hereof and marked Exhibits A and B," all of the conditions of which have been fully complied with by the plaintiffs.

The defendant in its answer denied liability because of the alleged failure of the plaintiffs to comply with the provisions of the policy in reference to the proof of loss, and because of the failure of the plaintiffs to comply with the provisions of the "iron-safe clause" of the policy which is fully set out in the assignment of error.

A trial resulted in a judgment for the plaintiffs for the amount sued for, with interest and cost of suit. A motion for a new trial, filed in due time, was overruled, and from the action of the court in rendering judgment against the company, and in overruling defendant's motion for a new trial, an appeal has been prosecuted to this court.

Opinion.

SPRINGER, *Ch. J.*:

In addition to the assignment of error in this case, the appellees contend that the bill of exceptions in this case was not filed in court within the time required by law. The case was tried in the court below on the 23rd day of September, 1895. Motion for new trial was overruled and sixty days' time was allowed within which to prepare and file bill of exceptions. By two separate agreements, sign- by attorneys for both parties, the time for preparing and filing the bill of exceptions was extended until the 19th day of January, 1896. On December 28, 1895, the attorney for the appellant received the bill of exceptions from the court stenographer. On January 13, 1896, the attorney for the appellant appeared at Ardmore to present his bill of exceptions to Judge Kilgore, but he was not there at that time, being in attendance upon the United States court

of appeals for the Indian Territory, at South McAlester. The attorney started immediately for South McAlester, and on arriving there learned that Judge Kilgore had, on the day before his arrival, departed for the city of Washington, where he was called upon public business. The attorney thereupon sent the bill of ex-
98 ceptions by express to Judge Kilgore at Washington, where the same was received on January 18, the day before the time for signing the same had expired. Judge Kilgore declined to sign the bill of exceptions upon the ground that it did not contain a true record of the case, and for the further reason that it had never been presented to the attorneys for the appellees. An application was made to the United States court of appeals for the Indian Territory for a writ of mandamus, to compel Judge Kilgore to sign the bill of exceptions in this case. The court refused to grant the writ of mandamus for the reason that Judge Kilgore, in his response to said writ, stated that at the time the bill of exceptions was presented to him he had no means of examining the official report for the purpose of correcting the bill of exceptions, and he refused to sign the purported bill of exceptions presented to him for the reason that it was incorrect. He further stated that no other different bill of exceptions was ever presented to him for his signature; and further that he was willing to sign a correct bill of exceptions in the case, and would have signed the same had a correct one been presented to him within the time fixed by the court, but that in his judgment he had lost jurisdiction of the matter after the 18th day of January, 1896.

There can be no question but that had Judge Kilgore remained in the Indian Territory, there would have been ample time to have corrected the bill of exceptions and to have signed it within the time fixed by the court. It was unfortunate for the appellant that the judge was compelled to leave the Territory before signing the bill of exceptions, but laches ought not to be imputed to them on this account. In the case of People *v.* Van Buren, 41 Mich., 725, the supreme court of that State, of which Judge Cooley was then a member, said: "The party who prepared the bill of exceptions having done all in his power to comply with the various orders made for its settlement, and having completed and furnished his bill in due time for that purpose, he cannot lawfully be deprived of his right to have it settled and signed by any failure of the judge or of the opposing party to have it regularly completed at the time appointed." See also People *v.* Littlejohn, 11 Mich., 60. And in another case the same court held: "Although there was great delay in settling the bill of exceptions, it appears to have been from the inaction of the judge and not from the fault of the party. The case, therefore, cannot be distinguished from other cases before decided, where parties have been deprived of their exceptions by circumstances beyond their control." People *v.* Circuit Judge, 41 Mich., 725. The same court also held: "Where parties have pre-
99 pared their bill of exceptions and presented it in season to the judge, they are not responsible for subsequent delays for which they are in nowise in fault, and the bill of

exceptions will not be stricken out under such circumstances. In the present case the plaintiffs in error were prompt, and the delays were on the other side." City of Detroit *v.* Blakeley *et al.*, 20 Mich., 220. In Elliott's Appellate Procedure, sec. 802, the rule is stated as follows: "If the bill is presented to the judge in the prescribed time and he fails to sign it, the party does not thereby lose his right to have the bill signed and filed." Also Cramer *v.* Sirp, 91 Ind., 366; Ham *v.* Romine, 98 Ind., 77; Robinson *v.* Anderson, 106 Ind., 152. In the Enc. of Pleading and Practice, vol. 3, 474, the rule is said to be: "When the exceptant, seasonably tenders the bill, it is not invalidated by the failure of the judge to sign until after the expiration of the time required by law, as it is the fault of the judge and not of the appellant." Other authorities on this point might be cited, but we deem it unnecessary.

This court, on April 2, 1898, in the case of Young *v.* United States, held that a bill of exceptions which was signed by the judge in vacation within the time allowed by order thereof, but was not filed with the clerk until after the expiration of such time, and in vacation, became no part of the record. This court does not now modify the rule laid down in that case, that being the general rule in cases of this kind. But the question was not raised in that case, nor could it have been under the facts, that the delay was not the fault of the appellant. Where the appellant has performed his duty as required by law and by order of court he ought not to suffer by reason of any failure of the judge to approve the bill in time. In the case at bar, the failure to sign the bill in time was no fault of the judge, for he was called to Washington on official business; but his failure to do so was not the fault of the appellant, and was due to a circumstance over which he had no control. We are of the opinion, therefore, that the bill of exceptions in this case should be regarded as having been filed in time.

The assignments of error by the appellant requiring consideration by this court are limited to two.

I.

That the court below erred in permitting the plaintiffs, appellees in this court, to testify as to the value of the goods, wares and merchandise alleged to have been destroyed by the fire; that the plaintiffs had taken an inventory of the goods, wares and merchandise, but had lost the same, and in permitting the witnesses to testify what the inventory showed the goods to be worth on the first day of January, 1894.

100 The testimony in this case discloses the fact that a disastrous fire occurred in the town of Ardmore in the year 1895, and that the appellees in this case, who were merchants, doing business in that town, when they saw the fire approaching their building and that its destruction was inevitable, undertook to remove the books of the firm, which were kept in an iron safe, to the residence of the appellees, believing that they would be in a place of greater safety at the residence, which was not in the path of the fire, than if left in the safe. The parties did undertake to remove

their books. There were quite a number of them, and in the hurry and confusion which ensued, one book was lost and destroyed in the fire. This was the book containing the last inventory of stock which had been prepared by the appellees. Having shown by the testimony of appellees that they had lost these books, they were permitted to show by oral evidence their contents. The supreme court of Tennessee, in the case of McNutt *v.* Va. Fire & Marine Ins. Co., decided Oct. 31, 1897, 45 S. W. Rep., 61, held that the appellant in that case, proving as he did satisfactorily the contents or result of the inventory, would, in effect, be a production of the inventory.

The court, therefore, did not err in permitting the appellees, after having proven the loss of the inventory, to prove its contents by oral evidence.

II.

The appellees further assign as error in this case the following instruction, which was given by the court:

"Now, if they (plaintiffs) had been guilty of negligence in the discharge of their duty, in the discharge of the obligations imposed by policy, they would not be entitled to recover, and that is a question you must pass upon. It is contended by the plaintiffs that when the fire was on, a great fire, sweeping a whole town out of existence, in order to protect their records and books in accordance with the obligations which this policy imposed upon them, they opened the safe and took from it all the books relating to the business. If it was in the safe, and in taking it out it was lost in the excitement and destroyed, you are instructed that the loss or destruction of that book, and the failure to produce it, would not, in itself, defeat the recovery. If there was a fraud perpetrated in its loss or destruction, or the parties are guilty of any negligence, or sufficient want of care under the circumstances, when the book was lost, that would be sufficient to defeat a recovery; but if they acted in good faith, with the use of diligence and care that business men
101 usually employ, the loss of that book, under the circumstances, would not defeat a recovery, and they would be entitled to recover."

Appellant also assigns as error the following instruction which was given by the court:

"Now, if the plaintiffs kept such books and inventory locked in a fireproof safe on the night that the goods were destroyed by fire, and the plaintiffs, for the purpose of better protecting said books and inventory, attempted to remove them to some other secure place not exposed to a fire that would have destroyed the house in which the (*building*) business was operated, and in such effort any part of the books were destroyed, plaintiffs were acting within the scope of authority granted them by the iron-safe clause of said policy."

These instructions properly submitted to the jury the issues in the case. The iron-safe clause which was contained in the policy of insurance sued on is in the usual form in such cases, and by the terms of which the insured covenanted and agreed to keep a set of

books "showing a complete record of the business transacted, including the purchases and sales both for cash and on credit, together with the last inventory of said business, and to keep such books and inventory securely locked in a fireproof safe at night and at all times when the store mentioned in the policy is not actually opened for business, or in some secure place not exposed to a fire which would destroy the house in which said business is carried on." It was further agreed that in case of loss, the insured would produce such books and inventory, and in the event of failure to do so the policy would be null and void and no suit or action at law should be maintained thereon for any such loss.

Counsel for appellant requested the court to instruct the jury that this clause of the policy "is a warranty on (—) part of the assured, and his failure to meet the requirements of such warranty in any particular forfeits the policy, and the failure of the assured to produce, in case of loss, the inventory, as required by such warranty, would defeat plaintiffs' right to recover, and said policy would be null and void."

The court properly refused this instruction, and as we think, properly stated the law to be as presented by the court in the instructions above quoted.

It is conceded by counsel in this case that the decisions of the courts are conflicting in reference to the effect to be given to what is known as the iron-safe clause in modern insurance policies.

102 This court is of the opinion that a strict compliance with the conditions of the iron-safe clause is not required, but if there is a substantial compliance with these covenants, the assured will be entitled to recover. Brown *v.* Palatine Ins. Co., 35 S. W., 1960.

In the case of Western Assurance Co. *v.* Redding, 68 Fed., 708, Judge McCormack, speaking for the court said: "Viewed as a set of books from the standpoint of an expert in that scientific system of book-keeping which obtains in the business of an insurance company, which has pushed its business, at least, from the chief city of Canada, to the obscure hamlet of Greenville, Fla., these books in evidence are primitive to a degree that may test his temper, if not his skill; but to impartial jurors, patiently searching for proof to support a recovery on a contract of indemnity for a loss insured against, and incurred without fraud or fault on (—) part of the insured, these books tell a plainer story than the expert, unconsciously or strenuously looking to them for ground of forfeiture, was able to read in them. To our view, the very imperfections of these books vouch for their good faith. It is insisted that the accounts of goods purchased should have set out the specific articles and the value of each, and that the account of cash sales should have been equally particular as to articles sold and the price, for it is argued the insured may have sold goods at one-tenth of their cost price, for aught that appears in these entries of cash sales. If these accounts were to have been thus kept, thus itemized, why not have said so? There was time and space in the clause in question to provide expressly that the inventory of stock to be taken at least once every

year, should be itemized. If the account of purchases and sales were to be so itemized, why take stock at all?" This opinion by Judge McCormack is applicable to the contention of appellant in this case and as we think clearly states the rule which should govern. In the case of McNutt *v.* Va. Fire and Marine Ins. Co., *supra*, Judge Barton, speaking for the supreme court of Tennessee in that case said:

"Did the agent of the insurer suppose that this would be done; that the contract was understood to be that there was to be absolutely no mistake and that the books should show with absolute and scientific correctness the whole truth and nothing but the truth, and that without any explanation, in regard to every single transaction that occurred during the pendency of the policy? Such suppositions would be absurd. It is a matter of universal information, of which we may take judicial knowledge, that, as a rule, books are not kept in the country stores in this State up to any such state of excellence. And for the defendant company to issue policies and receive premiums, understanding that such policies
103 are capable of such construction would, with the knowledge they must have of business prevailing among their patrons, be obtaining money fraudulently. As was said by Judge McCormack, common honesty and common sense are safe guides in the construction of even these wonderfully devised contracts, and the courts should and do and will apply to these the doctrines that obtain in adjudging forfeitures, because they can be nothing more. They are conditions subsequent on which a forfeiture is sought." And further in the same opinion, the supreme court of Tennessee holds:

"We think, on well-settled principles, and in accordance with the spirit of the entire line of our own cases in construing these exacting provisions of insurance policies, which are so little understood by the patrons of insurance companies, that as to this particular clause, as well as those above considered, the rules of construction should be honesty, good faith and good common sense. And as they are solely condition- subsequent, on which a forfeiture is sought, they should be construed strictly against the right of forfeiture. And we, therefore, hold that the proof showing, as we find, that the complainant had endeavored in good faith to comply with all the terms and conditions of his policy and that he kept his books in good faith and that he supplied all the deficiencies by obtaining duplicate invoices and showing beyond question the status of his inventory and kept it in the safe, but because he had been engaged, on the evening previous to the fire, he accidentally omitted to place the book within his safe, its accidental loss will not preclude him from recovery."

There are other errors assigned in this case which we do not deem it necessary to consider. The principal contentions are embraced in the assignments to which reference has been made.

We are of the opinion that there is no reversible error in the record and that the insured in this case, under all the facts and circumstances, were entitled to recover the amount of their demand.

The facts were fairly submitted to the jury and were found in their favor.

One feature worthy of notice in this case is that there is no intimation in the record that the insured acted otherwise than in good faith. Their integrity and their honest endeavors to comply with the terms of the policy undoubtedly had their proper weight with the jury in determining the questions of fact in the case.

The judgment of the court below is affirmed.

Clayton, Thomas and Townsend, JJ., concur.

104 And afterwards, to wit, on the same day the said court entered its judgment in said case on said opinion, which is in the words and figures following, to wit:

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, Appellant,
vs.
T. K. KEARNEY and J. W. WYSE, Partners as Kearney & Wyse, Appellees.

Appeal from court for the southern district.

This cause came on to be heard upon the transcript of the record of the court for the southern district of the Indian Territory, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said court for the southern district in this cause.

It is therefore considered by the court that the judgment of said court for the southern district, in this cause rendered, be and the same is hereby in all things affirmed with costs.

And it appearing to the court that said appellant with S. P. Anderson and C. L. Anderson as sureties has filed a supersedeas bond in this cause:

It is further considered, that said appellees recover of said appellant and S. P. Anderson and C. L. Anderson the sum of thirty-five hundred dollars with interest at six per cent. per annum from the 19th day of April, A. D. 1895, the amount of judgment in said court for the southern district, and the further sum of three hundred and fifty dollars and no cents, being ten per cent. thereon and costs.

It is further considered, that said appellees recover of said appellant and said sureties all their costs in this court in this cause expended, and have execution thereof, as well as of said judgment.

And afterwards, to wit, on the 25th day of June, 1898, the said appellant filed in the said clerk's office its motion for a rehearing in the said cause, which is in the words and figures following, to wit:

In the United States Court of Appeals for the Indian Territory at South McAlester.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, Appellant,
vs.
KEARNEY & WYSE, Appellees.

Now comes the appellant, The Liverpool & London & Globe Insurance Company, and respectfully prays that it be granted
105 a rehearing in the above-styled cause for the following reasons, to wit:

First. Because it appears from the opinion of the court in said cause that the court only considered two of the errors assigned by the appellant and wholly disregarded other assignments of error which are of vital importance to the rights of appellant.

Second. Because the court erred in its view of the law relating to the two assignments of error considered by the court in this: That the court held, as appears from the opinion in the case, that only a partial compliance with the provisions of the iron-safe clause of the policies sued on was required on part of the appellees, Kearney & Wyse, when the law requires a full compliance with the same.

Third. Because the court wholly disregarded the 14th assignment of error wherein the action of the court below in refusing to instruct the jury to find for the defendant was questioned, and also wholly disregarded the 17th assignment of error, wherein the ruling of the court below in overruling defendant's motion for a new trial, was questioned. Under the first of these assignments of error appellant undertook to question the sufficiency of the evidence to sustain the verdict and judgment in this case, and in the first brief filed by them, they devoted 18 pages of their brief to the consideration of this question, making extensive quotations from the evidence in the case and citing a large number of authorities showing that, under the law and the evidence in the case, the plaintiffs were not entitled to recover; and more than half of the brief filed by the attorneys for the (—) in a reply to the brief for the appellees, was devoted to a consideration of the same subject. The evidence quoted on pages 22 to 31 of the first brief filed for appellant shows conclusively that the plaintiffs not only did not comply substantially with the provisions of the iron-safe clause of the policies, but that there was a total failure to comply with the requirements, that the assured "agreed to keep a set of books showing a complete record of the business transactions including all purchases and sales, both for cash and on credit;" that the books kept by Kearney & Wyse showed no effort on their part to keep a record of their daily sales, but on the contrary, showed that they did not keep a record of their daily sales; that the only book of original entry kept by them was what they called their day book, which was made
up from the money which they found in the drawer at night,
106 consisting of the cash taken in on collections and sales; that their books had been kept in the same way for several years,

in fact ever since they had engaged in business. Notwithstanding all this, the court failed to consider or pass upon appellant's assignment of error raising the questions therein involved for the consideration and asking a reversal of the case on account of appellees' total failure to comply with the terms of the policies sued on.

Wherefore, appellant presents this petition for a rehearing to Hon. W. H. H. Clayton, and prays that he direct that the same be filed as required by law and the rules of the court; that a rehearing be granted this appellant, and that its attorneys be permitted to argue this cause orally before the court.

LEDBETTER & BLEDSOE,
Attorneys for Appellant.

Indorsed: "Motion for rehearing refused. Wm. H. H. Clayton, judge." "June 25, 1898." "Filed June 25, 1898. Wm. P. Freeman, clerk."

And afterwards, to wit, on the 25th day of July, 1898, the said appellant filed in the office of the clerk of said court its petition for a writ of error, which is in the words and figures following, to wit:

In the United States Court of Appeals for the Indian Territory at South McAlester.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY
vs.
KEARNEY & WYSE.

Petition for Writ of Error.

To the Hon. W. H. H. Clayton, one of the judges of the United States court of appeals for the Indian Territory:

The Liverpool & London & Globe Insurance Company, appellant in the above-styled cause, deeming itself aggrieved by various errors occurring on the trial of said cause in the United States court for the southern district of the Indian Territory at Ryan, and in the United States court of appeals for the Indian Territory at South McAlester, and especially by the order, judgment and decree rendered in this cause on the 16th day of September, 1895, wherein the said appellees, Kearney & Wyse, a copartnership firm composed of T. K. Kearney and J. W. Wyse recovered judgment in said United States court at Ryan for the sum of $3,500.00, and by the judgment and decree of said United States court of appeals for the Indian Territory, rendered on the 14th day of June, 1898, wherein
107 the said judgment in the court below was affirmed, hereby prays for a writ of error from the said judgment and decree of the United States court of appeals to the United States court of appeals for the eighth circuit at the city of St. Louis, and hereby prays that its writ of error be allowed, and that the transcript of the record and proceedings, and all papers upon which judgments, orders and decrees were made duly authenticated may be sent to

the United States circuit court of appeals for the eighth circuit at the city of St. Louis.

LEDBETTER & BLEDSOE,
Att'ys for Appellant.

And now, to wit, on the 25th day of July, 1898, it is hereby ordered that the writ of error prayed for in the foregoing prayer by the Liverpool & London & Globe Insurance Company be and the same is hereby allowed.

WM. H. H. CLAYTON,
Judge of the United States Court of Appeals for the Indian Territory.

Indorsed: "Supersedeas bond in above-styled cause is fixed at the sum of $7,000.00 and fifteen days' time given in which to file bond. Wm. H. H. Clayton, justice of the United States court of appeals for the Indian Territory." "Filed July 25th, 1898. Wm. P. Freeman, clerk."

And afterwards, to wit: on the same day, July 25th, 1898, the said appellant filed in said clerk's office its assignment of error, which is in the words and figures following, to wit:

In the United States Court of Appeals for the Indian Territory.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, Plaintiff in Error,
vs.
KEARNEY & WYSE, Defendants in Error.

Assignments of Error.

Now comes the plaintiff in error, The Liverpool & London & Globe Insurance Company, and respectfully alleges that there are in the records and proceedings in this cause the following manifest errors occurring in the United States court for the southern district of the Indian Territory at Ryan, and in the United States court of appeals for the Indian Territory at South McAlester, to wit:

I.

The trial court erred in permitting the plaintiff, T. K. Kearney, to testify as to the value of the goods, wares and merchan-
108 dise alleged to have been destroyed by fire; that the plaintiff had taken an inventory of the goods, wares and merchandise, but had lost the same, and in permitting the witness to state what the inventory showed the goods, wares and merchandise to be worth on the 1st day of January, 1894, or any other time, said witness, over the objection of the defendant in the trial court, testifying in respect to these matters as follows:

Q. How many goods did you have?
A. Between $10,000 and $12,000.

Q. Had you taken an inventory of your property, your stock at any time?

A. Yes, sir, we had.

Q. When had you taken the last inventory?

Objected to as incompetent, irrelevant and immaterial and not the best evidence. Overruled. Exception by defendant.

A. About the 1st of January, 1895, as well as I recollect.

Q. Where did you keep that inventory?

A. In that safe.

Q. Where is that inventory now?

A. I can't tell—lost.

Q. Where was it lost?

Objected to as incompetent, irrelevant and immaterial. Overruled. Exception by defendant.

A. Lost it that night.

Q. What did that inventory show was the value of your stock of goods when it was taken 1st of January, 1894?

Objected to as immaterial, irrelevant and incompetent, not the best evidence. Objection overruled. Exception by defendant.

Q. Was or was not that a correct inventory of the property at the time it was lost?

Objected to as incompetent, immaterial and irrelevant and not the best evidence. Overruled. Exception. (Tr., 34.)

All of said testimony being incompetent and inadmissible for the reason that the policy sued on, among other things, provided that "the assured, under this policy hereby covenants and agrees to keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business, and further covenants and agrees to keep such books and inventory in a securely locked iron safe at night and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to fire which would destroy the house where such business is carried on, and in case of loss the assured agrees and covenants to produce such books and
109 inventory, and in the event of a failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

II.

The court erred in permitting the plaintiff, Kearney, to testify as follows:

Q. Mr. Kearney, in either one of these proofs of loss, was the statement attached showing the amount of cash sales and credit sales and the amount of your purchase from the last inventory taken before the fire?

Objected to as incompetent, irrelevant and immaterial and not the best evidence. Overruled. Exception by defendant.

A. Yes, sir. (Tr., 8.)

III.

The trial court erred in permitting the plaintiff, Kearney, to testify as follows:

Q. Mr. Kearney, did you or not remove the books from that safe on that night?

Objected to as incompetent, irrelevant and immaterial, and leading and not proper under the issues in the cause, a waiver not being pleaded. Objection sustained in so far as it is leading.

Q. What did you do with your books that night the fire took place?

Objected to as incompetent, irrelevant and immaterial and not proper under the issues in this case. Overruled. Exception.

A. When I saw we were going to burn, I went into the house, into the store and got the books out of the safe.

Q. Where was the fire when you went in there, with reference to your house?

A. It was directly over north in a house opposite. We were on the south side.

Q. Your house was catching fire?

A. Yes, sir, a glass broke out as I went in there.

Q. What was your purpose in removing the books from that safe?

A. I wanted to remove the books; I thought it would be better to take them out than to run the risk of them in there.

Q. Did you or not endeavor to get all the books out of the safe and carry them to a place of safety?

110 Objected to as incompetent, irrelevant and immaterial and not proper under the issues in this case. Overruled. Exception.

A. Yes, sir.

Q. Were there any other books lost except the inventory?

A. Yes, sir.

Q. Do you remember what other books?

Objected to as incompetent and immaterial and not proper under the issues in this case. Overruled. Exception.

A. I think so. An old cash book, and probably some other old day book or blotter.

Q. Did you or not intentionally leave that inventory in there, or any book in that room that night?

A. I did not.

Q. How large a book was that inventory?

A. It was a small book, paper back.

Q. About what was the weight of them, of all the books you had to carry?

Objected to as incompetent, irrelevant and immaterial and not proper under the issues herein. Overruled. Exception.

A. About 125 pounds.
Q. The number of volumes?
A. No, I mean the weight.
Q. Were there a number of books?
A. Yes, sir, a number of them.
By the COURT: When did you first miss this book or discover you had lost it?
A. When the safe was opened after the fire.
By the COURT: Did you close the safe after taking the books out?
A. I just shut the door. I don't remember whether I bolted it or not.
By the COURT: Did you have other books left on the inside?
A. Yes, sir.
By the COURT: Were they preserved?
A. Yes, sir.
Mr. CRUCE: What was the condition of the books left in the safe?
A. We had an old book there that the back was slightly burned.

Mr. CRUCE: We now offer in evidence the proofs of loss and ask to read them to the jury.

Objected to as incompetent, irrelevant and immaterial and not proper under the issues in the case. They have not shown that the original cannot be produced. Objection overruled. Exception by defendant, and proof of loss read to the jury. (Tr., 8–11.)

111 All of said evidence being incompetent and inadmissible under the issues made by the pleading in the case and under the provisions of the policy sued on above quoted.

IV.

The trial court erred in permitting the witness, Kearney, to testify as follows:

Q. What effort was made to adjust the loss?

Objected to as incompetent, irrelevant and immaterial and not proper under the issues in this case, as no waiver was pleaded. Objection overruled. Exception.

Q. State to the jury what effort was made between you and Mr. Van Valkenburg to adjust this loss?

Same objection and ruling as above.

A. He had Mr. McCoy to make up a statement. I helped him. We went through the book and the statement was rendered to Mr. Van Valkenberg, and I had a meeting with him and we tried to adjust it—at least I tried.
Q. What did he do?
A. He made a proposal——

Defendant objected to any proposal of compromise, as that forms no part of the issues in this case. (Tr. 11.)

V.

The trial court erred in permitting the plaintiff, T. K. Kearney, on direct examination, to testify as follows:

Q. About what was the value of the stock of goods in the wareroom?

Objected to as incompetent, irrelevant and immaterial and not proper under the issues herein.

Q. At the date of the fire I mean.

Same objection—not the best evidence. Overruled. Exception.

A. I suppose about $4,000.
Q. Those in the wareroom?
A. Yes, sir.
Q. About what do you estimate for the value of the goods in the brick building?

Objected to as incompetent, irrelevant and immaterial and not proper under the issues in this case. Overruled. Exception.

A. About $8,000. (Tr. 23.)

112 VI.

The trial court erred in permitting said witness, Kearney, to testify as follows:

Q. You agreed in this iron-safe clause that you would keep these books and inventory in the fireproof safe at night and at all times when the stores mentioned in this policy is not actually in use, or that you would keep them in some secure place from a fire which would destroy the house. Where did you take these books after you removed them that night?

Objected to as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

Q. Where did you take those books to?
A. Took them to my house.
Q. Was that property destroyed that night?
A. No, sir; the fire didn't reach that far.
Q. This slip of paper containing the iron-safe clause. Is that part of your policy, or is it a slip of paper different attached to your policy?

Objected to as incompetent, irrelevant, and immaterial.

Q. Is that slip of paper a part of that policy? Was that iron-safe clause in the original policy, or is it a slip of paper attached to it?

Same objection. Overruled. Exception.

A. It is the paper attached to it.
Q. Is that slip of paper in fine or large print?
A. Fine print. (Tr. 23, 24.)

VII.

The trial court erred in permitting the witness, Kearney, to testify as follows:

Q. You had another book that did show the credit sales?
A. Yes, sir.

Objected to as incompetent, irrelevant, and immaterial and leading. Objection sustained in so far as it is leading.

Q. Is it not a fact that you kept a book showing the total sales and that you could tell the total sales?

Objected to as unfair and leading. The books are the best evidence. He can produce the books and explain what the books show.

By the COURT: He had a right to re-examine him upon any matter brought out.

113 Q. Are you an expert book-keeper?
A. No, sir.
Q. Is Mr. Wyse?
A. No, sir.

Question and answer objected to as incompetent and immaterial.

Q. What is the truth, Mr. Kearney, as to whether or not these books you have here (I don't mean whether one book shows specifically the amount) show the total amount of cash sales?

Objected to as leading.

Q. What is the truth as to whether or not the books you have there show the total amount of cash sales and credit sales from the time of the last inventory to the time of the fire?
A. They did.
Q. They do?
A. Yes, sir. (Tr. 24, 25.)

Said testimony being incompetent and inadmissible, because it does not show a compliance with the clause of the policy sued on above quoted.

VIII.

The trial court erred in permitting J. W. Wyse, one of the plaintiffs, to testify as follows:

Q. Had you taken an inventory of that stock of goods?
A. We had taken an inventory I think about a year previous to the fire.
Q. About what time?
A. About January 1.

Question and answer objected to by defendant as incompetent, irrelevant and immaterial and not proper, under the issues in the case to attempt to prove that an inventory was taken. Overruled. Exception taken.

Q. Where is that inventory now?
A. I don't know.
Q. Do you know how it got lost or destroyed?
A. Yes, it was destroyed in the fire I suppose.
Q. Are you able to produce the inventory now?
A. No, sir.
Q. What was the value of your goods as per that inventory?

Objected to as incompetent, immaterial and irrelevant and not the best evidence and improper under the issues. Overruled. Exception.

A. About $9,000 I think. (Tr. 28.)

114 IX.

The trial court erred in permitting J. W. Wyse, one of the plaintiffs, to testify as follows:

Q. Now, Mr. Wyse, what was the value of the goods in the brick house that night that they were destroyed by fire?

Objected to as incompetent, irrelevant and immaterial and not the best evidence. Overruled. Exception.

A. About $8,000.
Q. About what was the value of the goods in the warehouse?

Same objection and ruling. Exception.

A. About $4,000.

All of said testimony being inadmissible, because it does not show a compliance with the provisions of the policy above quoted. (Tr., 28, 29.)

X.

The trial court erred in permitting J. W. Wyse to testify as follows:

Q. Did or not that statement show Mr. Van Valkenberg the amount of your cash sales and your credit sales during the time since the last inventory?

Objected to as incompetent, irrelevant and immaterial and not the best evidence. The books are the best evidence. Overruled. Exception by defendant.

Q. What is the truth as to whether or not he had a statement of that kind made by Mr. McCoy?
A. He had the statement made.
Q. Do you know where that statement is?
A. No, sir, we never had it after it was made.

Q. Is it in their possession?
A. Yes, I suppose so.

Question and answer objected to as incompetent, irrelevant and immaterial. No effort made by plaintiffs' counsel to procure the original, if there was such, no demand made.

Q. What is the truth as to whether or not you made a demand upon the insurance company?
A. We made demand.
Q. Did they produce it?

Objected to as incompetent, irrelevant and immaterial. An oral demand is not contemplated by the statutes. Overruled. Exception.

A. No, sir.

115 Q. Now, Mr. Wyse, when did the local agent for the company, Mr. Mays, ascertain that your goods were destroyed by fire?

A. While the fire was burning he was there.
Q. When did you first talk to him about the loss?

Objected to as incompetent, irrelevant and immaterial. Objection overruled. Exception taken.

A. While the fire was burning. (Tr., 30, 31.)

XI.

The trial court erred in refusing to strike out the two answers of the witness, J. W. Wyse, on his redirect examination, on page 37, of the transcript in the case, as follows:

Q. I believe you made a (*stated you made a*) statement to R. G. Dun & Co. from this inventory. Is that correct?
A. Yes, sir.
Q. Since the fire you have sent to R. G. Dun & Co. for a copy of it?
A. Yes, sir.

XII.

The trial court erred in charging the jury in its instructions in chief as follows, to wit:

Now, if they (plaintiffs) had been guilty of negligence in the discharge of their duty, in the discharge of the obligations imposed by the policy, they would not be entitled to recover, and that is a question you must pass on. It is contended by the plaintiffs that when the fire was on, a great fire, sweeping a whole town out of existence, in order to protect their records and books in accord with the obligations which this policy imposed upon them, they opened the safe and took from it all the books relating to the business, if it was in the safe, and in taking it out, it was lost in the excitement and destroyed, you are instructed that the loss or destruction of that book, and the failure to produce it would not in itself defeat the recovery.

If there was a fraud perpetrated in its loss or destruction or the parties were guilty of any negligence, or a sufficient want of care under the circumstances, when the book was lost, that would be sufficient to defeat a recovery; but if they acted in good faith, with the use of diligence and care that business men usually employ, the loss of that book, under the circumstances, would not defeat a recovery, but they would be entitled to recover. (Tr., 93.)

XIII.

The trial court erred in its charge in chief in instructing the jury as follows:

Now, if the plaintiffs kept such books and inventory locked in a fireproof safe on the night that the goods were destroyed by
116 fire, and the plaintiffs, for the purpose of better protecting said books and inventory, attempted to remove them to some other secure place not exposed to a fire that would have destroyed the house in which the business was operated, and in such effort, any part of the books were destroyed, plaintiffs were acting within the scope of authority granted them by the iron-safe clause of said policy. (Tr., 94, 95.)

XIV.

The trial court erred in refusing to give the following instruction requested by counsel for defendant:

I instruct you, gentlemen of the jury, under the evidence in this case, plaintiffs are not entitled to recover and your verdict must be for the defendant. (Tr., 95.)

XV.

The trial court erred in refusing to give the jury the following instruction requested by the defendant:

I instruct you, gentlemen of the jury, that the policy sued on in this action, No. 10292, for the sum of $2,500 contains the iron-safe clause, which provides, among other things, that "the insured under the policy hereby covenants and agrees to keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and on credit, together with the last inventory of said business, and covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house in which such business was carried on, and in case of loss, the assured agrees to produce such books and inventory, and in the event of a failure to produce the same, the policy shall be null and void, and no suit or action at law shall be maintained thereon for any such loss." I further instruct you that this clause of the policy is a warranty on the part of the assured, and his failure to meet the requirements of said warranty in any particular avoids the policy; and a failure by the assured to produce in a case of loss the inventory as required by said warranty

would defeat the plaintiffs' right of recovery, and said policy would be null and void (Tr., 96).

XVI.

The trial court erred in refusing to give the jury the instruction, the same as the last above mentioned in reference to the other policy sued on in the case, No. 10348.

117 XVII.

The trial court erred in overruling defendant's motion for a new trial.

XVIII.

The plaintiff in error, The Liverpool & London & Globe Insurance Company, respectfully shows that the foregoing assignments of error are in substance and effect the same assignments of error presented to the United States court of appeals for the Indian Territory, and now here allege that the said United States court of appeals for the Indian Territory erred in overruling the first assignment of error set out above.

XIX.

The United States court of appeals for the Indian Territory erred in overruling the second assignment of error presented therein, being the 12th assignment of error set out above.

XX.

Because the court erred in refusing to consider the other assignments of error presented in said United States court of appeals for the Indian Territory.

XXI.

The United States court of appeals for the Indian Territory erred in wholly disregarding the 14th assignment of error wherein the action of the court below in refusing to instruct the jury to find for the defendant was requested, and also in wholly disregarding the 17th assignment of error and in the ruling of the court below in overruling defendant's motion for a new trial was requested. Under the first of these assignments of error the plaintiff in error undertook to question the sufficiency of the evidence to sustain the verdict and judgment in this case, and in the 17th assignment of error the plaintiff in error undertook to question the action of the court below in overruling the motion for a new trial.

XXII.

Because the court erred in overruling its order made on the 25th day of June, 1898, in overruling the motion of plaintiffs in error for a rehearing in said cause.

Respectfully submitted.

LEDBETER & BLEDSOE,
Att'ys for Pl'ff in Error.

Indorsed: Liverpool & London & Globe Ins. Co. *vs.* Kearney & Wyse. Assignment of errors. Filed July 25th, 1898. Wm. P. Freeman, clerk.

118 And afterwards, to wit: on the 28th day of July, 1898, the said appellant filed in the office of the clerk of said United States court of appeals in the Indian Territory its supersedeas bond, which is in the words and figures following, to wit:

Know all men by these presents, that we, The Liverpool and London and Globe Insurance Company and J. F. McMurray, are held and firmly bound unto Kearney & Wise in the full and just sum of seven thousand dollars, to be paid to the said Kearney & Wise, their heirs, executors, administrators and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 28th day of July (A. D. 1898), in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, lately at the June term of the United States court of appeals in the Indian Territory at South McAlester, I. T., in a suit depending in said court between Kearney & Wise, plaintiffs, and the said The Liverpool and London and Globe Insurance Company, defendants, judgment was rendered against the said The Liverpool and London and Globe Insurance Company, and the said The Liverpool and London and Globe Insurance Company has obtained an appeal of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Kearney & Wise, citing and admonishing them to be and appear in the United States circuit court of appeals for the eighth circuit at the city of Saint Louis, Missouri, sixty days from and after the date of said citation:

Now, the condition of the above obligation is such, that if the said The Liverpool and London and Globe Insurance Company shall prosecute said appeal to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY,
By J. F. McMURRAY.
J. F. McMURRAY.

Sealed and delivered in presence of—

——— ———.

Approved by—
WM. H. H. CLAYTON,
Judge U. S. Court for Central District, Indian Territory, and Associate Justice of the U. S. Court of Appeals.
July 28, 1898.

Indorsed: "Filed July 28, 1898. Wm. P. Freeman, clerk."

119 UNITED STATES OF AMERICA, } ss:
Indian Territory, }

In the Court of Appeals.

I, William P. Freeman, clerk of the United States court of appeals in the Indian Territory, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, in the cause therein named, in said court, as the same remains of record in my office. That the original writ of error and citation is returned herewith and made a part hereof.

Seal United States Court of Appeals in the Indian Territory.

In witness whereof, I have hereunto set my hand and affixed the seal of our said court, at office in the city of South McAlester, Indian Territory, this 29th day of July, A. D. 1898.

WM. P. FREEMAN, *Clerk.*

[Cancelled 10c. U. S. rev. stamp.]

Filed Aug. 22, 1898.

JOHN D. JORDAN, *Clerk.*

120 And on the twenty-second day of August, A. D. 1898, an appearance of Messrs. W. A. Ledbetter and S. T. Bledsoe, as counsel for the plaintiff in error, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

LONDON, LIVERPOOL & GLOBE INSURANCE CO., Plaintiff in Error, *vs.* KEARNEY & WYSE. } No. 1127.

The clerk will enter *my* appearance as counsel for the plaintiff in error.

W. A. LEDBETTER.
S. T. BLEDSOE.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1127. London, Liverpool & Globe Insurance Co., plaintiff in error, *vs.* Kearney & Wyse. Appearance. Filed Aug. 22, 1898. John D. Jordan, clerk. W. A. Ledbetter, S. T. Bledsoe, Ardmore, Ind. Ter., counsel for pl'ff in error.

And on the eleventh day of October, A. D. 1898, an appearance of Messrs. A. B. Quinton and E. S. Quinton, as counsel for the plaintiff in error, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, Plaintiff in Error.
vs.
T. K. KEARNEY ET AL. } No. 1127.

121 The clerk will enter my appearance as counsel for the plaintiff in error.

A. B. QUINTON.
E. S. QUINTON.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1127. The Liverpool & London & Globe Insurance Co., plaintiff in error, *vs.* T. K. Kearney *et al.* Appearance. Filed Oct. 11, 1898. John D. Jordan, clerk. A. B. Quinton, E. S. Quinton, Topeka, Kan., counsel for pl'ff in error.

And on the eleventh day of November, A. D. 1898, an appearance of Mr. A. C. Cruce, as counsel for the defendants in error, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Plaintiff in Error,
vs.
T. K. KEARNEY ET AL. } No. 1127.

The clerk will enter my appearance as counsel for the defendants in error.

A. C. CRUCE.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1127. Liverpool and London and Globe Insurance Co., plaintiff in error, *vs.* T. K. Kearney *et al.* Appearance. Filed Nov. 11, 1898. John D. Jordan, clerk. A. C. Cruce, counsel for def'ts in error.

And on the thirteenth day of January, A. D. 1899, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following:

122 United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

FRIDAY, *January* 13, 1899.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE Company, Plaintiff in Error, *vs.* T. K. KEARNEY ET AL. } No. 1127.

In error to the United States court of appeals in the Indian Territory.

This cause having been called for hearing this day, argument was commenced by Mr. E. S. Quinton in behalf of the plaintiff in error, and the hour of adjournment having arrived before the conclusion thereof, the further hearing of this cause was postponed until tomorrow morning.

And on the fourteenth day of January, A. D. 1899, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

SATURDAY, *January* 14, 1899.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE Company, Plaintiff in Error, *vs.* T. K. KEARNEY ET AL. } No. 1127.

In error to the United States court of appeals in the Indian Territory.

This cause having been called this day for further hearing, argument was continued by Mr. E. S. Quinton for the plaintiff in error, and by Mr. A. C. Cruce for the defendants in error, and concluded by Mr. E. S. Quinton for the plaintiff in error.

Thereupon the cause was submitted to the court upon the transcript of record from said court of appeals and the briefs of counsel filed herein.

123 And on the tenth day of April, A. D. 1899, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

124 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1898.

THE LIVERPOOL & LONDON & GLOBE Insurance Company, Plaintiff in Error, *vs.* T. K. KEARNEY and J. W. WYSE, Composing the Partnership of Kearney & Wyse, Defendants in Error.

No. 1127. In Error to the United States Court of Appeals in the Indian Territory.

Mr. A. B. Quinton (Mr. E. S. Quinton, Mr. W. A. Ledbetter and Mr. S. T. Bledsoe were with him on the brief) for the plaintiff in error.

Mr. A. C. Cruce (Mr. W. B. Johnson, Mr. W. I. Cruce and Mr. Lee Cruce were with him on the brief) for the defendant- in error.

Before Caldwell, Sanborn and Thayer, circuit judges.

This suit is founded on two insurance policies, one for $2,500 and one for $1,000, which were issued by The Liverpool & London & Globe Insurance Company, the plaintiff in error, to T. K. Kearney and J. W. Wyse, composing the firm of Kearney & Wyse, the defendants in error. The policies covered a stock of hardware located in the town of Ardmore, in the Indian Territory, which was destroyed by fire on the morning of April 19, 1895, during the life of the policies. For a defense to the claim made under the policies the defendant company appears to have relied altogether on the following provision of the policy, termed "the iron-safe clause:"

"The assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transactions, including all purchases and sales both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on: and in case of loss the assured agrees and covenants to produce such books and inventory and in the event of a failure to produce the same this policy
125 shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

Non-compliance with this clause was alleged in the defendant's answer in that the insured did not keep books showing a complete record of their transactions, including all purchases or sales for cash and credit, nor any inventory of said business or memorandum securely locked in a fireproof safe at night, or in some secure place not exposed to fire, and in that they did not furnish to the insurer, as a part of their proof of loss, a record of their transactions, that is, of the sales for cash or credit, or purchases, or an inventory of their business.

There was a verdict and a judgment at *nisi prius* in favor of the plaintiffs below, which judgment was affirmed by the court of ap

peals in the Indian Territory, 46 S. W. Rep., 414. The defendant below brought the case here on a writ of error.

THAYER, circuit judge, after stating the case as above, delivered the opinion of the court:

The defendant below, against whom the judgment was rendered, assigns several errors in the proceedings of the trial court, but each assignment presents only some special phase of the same general question, namely, whether the trial court properly construed and gave due effect to the "iron-safe clause" of the policy above quoted in the statement. Concerning the facts of the case there is practically no dispute. On the night of April 18, 1895, between the hours of one and three a. m. a fire accidentally broke out in a livery stable in the town of Ardmore, which was about three hundred yards distant from the plaintiff's place of business. Efforts to arrest the progress of the conflagration failed, and when it had approached so near to the plaintiff's place of business that the windows of their store were cracking from the heat and the building was about to take fire, one of the plaintiffs entered the building for the purpose of removing the books of the firm to a safer place, thinking that it would be better to remove them than to take the chances of their being destroyed by fire. He opened an iron safe in the store in which they had been deposited for the night, which was called a fireproof safe, and took them therefrom and to his residence some distance away. The books consisted of a ledger, a cash book, a day book or blotter, and a small paper-covered book containing an inventory that the firm had taken of their stock on or about January 1, 1895. In the hurry and confusion incident to the removal of the books, the inventory was either left in the safe and was destroyed, or was otherwise lost, and could not be produced after the fire. The other books, however, were saved, and were exhibited to the insurer after the fire and were subsequently produced as exhibits on the trial. There was neither plea nor proof that the loss of the inventory was due to fraud or bad faith on the part of the plaintiffs or either of them.

The trial judge charged the jury that the set of books which had been kept and which were produced on the trial "were substantially in compliance with the terms of the policy upon that subject," and an exception was taken by the defendant to this part of the charge. The books, though used at the trial as exhibits, do not form
126 a part of the record. For these reasons no question arises as to the sufficiency of the set of books that was kept which we are called upon to consider. It must be taken for granted that it was a proper set of books, as the trial court held. The only substantial ground for complaint seems to be that the inventory was not produced. Does the fact that the inventory was lost under the circumstances aforesaid, and was not produced vitiate the policies?

It will be observed from reading the "iron-safe clause" that the plaintiffs below did not bind themselves unconditionally to keep their books in a fireproof safe, at night, and at all times when the store was not actually open for business. Their engagement was to

so keep them "or in some secure place not exposed to a fire which would destroy the house where such business is carried on." They had an option, therefore, either to keep them in a fireproof safe or in some other secure place where they would not be liable to be destroyed by a fire which might destroy their place of business. We perceive no reason why the plaintiffs were not entitled to exercise this option of removing their books to some other safe place at any time and to exercise it, especially when a conflagration was sweeping toward their place of business which bid fair to destroy it and possibly to destroy their books as well, though contained in a safe. It cannot be said, we think, that having placed the books in the safe on the night of April 18, 1895, at the close of business they were bound to let them remain there until morning, no matter what might occur and that in the meantime they lost the right given by the policy to remove and keep them elsewhere. The option was a continuing one and it was eminently proper, we think, for the plaintiffs to exercise it during the night of the fire when it became obvious to them that their place of business was about to be destroyed. They acted prudently, doing what any other man of ordinary caution would have done if he entertained lurking doubts as to the fi of quality of his safe, or was unwilling to have his books buried perhaps for days under a mass of debris.

Counsel for the defendant company direct our attention, however, to the last paragraph of the "iron-safe clause," and urge, in substance, that the stipulation therein contained bound the plaintiffs, in any event to produce the inventory after the fire, and that even though it was lost and cannot be produced they are not entitled to recover. This argument proceeds upon the theory that the last paragraph of the "iron-safe clause" must be read literally; that it admits of no exceptions or qualifications and that the failure to produce the books or inventory for any reason vitiates the policies. We cannot assent to this view of the case. Like all contracts made between private parties and like all statutes, for that matter, they must receive a reasonable interpretation which will not work injustice or lead to absurd consequences. United States *v.* Kirby, 7 Wall., 482; Heidenfeldt *v.* Mining Co., 93 U. S., 634; Church of Holy Trinity *v.* United States, 143 U. S., 457, 460, 461; Scott *v.* Latimer, 89 Fed. Rep., 843; Thurber *v.* Miller, 32 U. S. App., 209; Davis *v.* Bohle, decided by this court February 13, 1899, — U. S. App., —; 93 Fed. Rep., 325. If it had been the intention of the defendant company that the final paragraph of the "iron-safe clause" should be construed as it now claims, then we perceive no motive for inserting the preceding clause which re-
127 quired the insured to keep his books in a fireproof safe, or other secure place, and that clause might as well have been omitted, giving him the power to keep his books where he pleased, and making his right to recover dependent upon the actual production of his books, and throwing upon him in all cases the responsibility for their production. Again, the construction contended for by the insurer might at times require the insured to produce his books

when, without any fault on his part, it would be physically impossible to do so. For example, if a burglar should blow open a safe containing books, and start a fire which should destroy the insured's books as well as his stock in trade—then he could not recover on a policy containing the "iron-safe clause," construed as we are asked to construe it. Nor could a person insured under such a policy recover against the insurer if he kept his books in a safe which he had every reason to believe was invulnerable against heat, provided it turned out not to be so, and his books were destroyed by an accidental fire.

These considerations lead us to conclude that the last paragraph of the "iron-safe clause" should not be read literally, and that neither party to the contract intended that it would be so read. It should be construed, we think, as requiring the insured to produce his books and inventory after a fire if it is within his power to do so, and as throwing upon the insured the responsibility for the loss of his books and inability to produce them, in all of those cases where their loss is due to a wrongful or fraudulent act on his part, or to his culpable negligence. In the case at bar we cannot say that there was any evidence tending to show that the inventory was lost and not produced for either of the aforesaid reasons. The plaintiffs appear to have exercised their right under the policy to remove the books to a more secure place, under circumstances which fully justified their conduct, and we do not find any evidence which tends to convict them of culpable negligence in the manner of exercising that right. In conclusion, we shall only add that the clause of the policy now under consideration has been construed by other courts in cases where the facts were only slightly variant from those disclosed by the present record, and the conclusions reached touching the proper interpretation of the clause are in substantial conformity with those which we have announced and with the instructions which were given by the trial judge. Jones *et al. v.* Southern Insurance Co., 38 Fed. Rep., 19, 21; Brown *v.* Pallatine Insurance Co., 89 Texas, 590; McNutt *v.* Virginia Fire & Marine Insurance Co., 45 S. W. Rep. (Tenn.), 61; Southern Insurance Co. *v.* Parker, 61 Ark., 207, 213. The judgment of the United States court of appeals in the Indian Territory and of the United States court for the southern district of the Indian Territory are therefore affirmed.

SANBORN, circuit judge, dissenting:

Is opening a fireproof safe in one's place of business in which a book is securely locked, and either taking the book out and losing it, or leaving it in an open safe so that it is burned up by an approaching fire which destroys the building in which it is situated, the performance of an agreement to keep the book "securely
128 locked in a fireproof safe * * * or in some secure place not exposed to a fire which would destroy the house where such business is carried on?" The opinion of the majority answers this question in the affirmative. I have been unable to resist the conclusion that it should be answered in the negative. The book certainly was not kept securely locked in a safe, nor was it kept "in

some secure place not exposed to a fire which would destroy the house where such business is carried on." On the other hand, the safe was unlocked, and the book was either lost or was actually exposed in the open safe or elsewhere to the fire which burned the house where the business was conducted, and was thereby destroyed. Is losing a book keeping it? Is exposing it to a fire by which it is destroyed, keeping it in some secure place not exposed to that fire?

It is said that the insured had the option to keep the book securely locked in the safe or in some secure place not exposed to a fire which would destroy the business house, that this was a continuing option, and that they complied with their contract if they lost the book in transit in the night while they were attempting to exercise this option, and to take it from the safe to another secure place. But is this argument sound? The contract was that "at night and at all times when the store mentioned in the within policy is not actually open for business" they would keep the book locked in the safe or in some secure place not exposed to a fire which would burn the building in which the safe was situated. It was that they would keep the book in one of two secure places during all of every night while the store was closed. It was not that they would keep it in one of those places or in transit between them. They undoubtedly had the right each day to choose in which place they would keep their book during the coming night, but, after the night had come and after the store was closed, if they took the book from the place which they had selected, and exposed it to the fire against which they had agreed to guard it, I see no escape from the conclusion that they violated their contract, because they no longer kept it in either of the secure places specified, and this, whether they removed it with the intention of transferring it from one place to the other or with some other purpose. They were not keeping it in either place while they were transferring it from one to the other. The contention of the majority here proves too much. If the insured could exercise their option once during the night, and after the store was closed, and expose the book to the danger of fire, they could exercise it many times and could thus keep the book continually in transit and in neither of the safe places where they agreed to have it during the entire night. In my opinion, an agreement to keep an article in one of two specified secure places during certain hours of the night is not performed by losing it in transit between them during those hours.

There is another proposition of the majority to which I cannot yield assent. It is, that an agreement to safely keep and to produce a book upon the trial of a lawsuit is not broken by a failure to keep and produce it, unless that failure is due to a wrongful or fraudulent act, or to the culpable negligence of the defaulter. The agreement of the insurer here was as clear and unambiguous as the English language could make it. It was that they would keep the inventory securely locked in the safe or in the other secure place speci-
129 fied each night, that they would produce it in case of a loss under the policy, and that, if they failed to do so, no action upon the policy should be maintained. They failed to keep it in either of the places named in the agreement, and they failed to pro-

duce it. It is said, however, that they never meant to agree to keep it or produce it, that they only intended to contract that they would not by any wrongful or fraudulent act or by any culpable negligence of theirs fail to keep and produce the book, that the contract should be construed according to this latter intention, and that, as the insurance company failed to prove any such fraudulent act or culpable negligence of the insured there was no evidence of a breach of the agreement, although the defendants in error utterly failed to do the acts which by the plain terms of the written contract they agreed to perform. But there is no evidence of the intention of the parties to this contract except the policy itself. The policy contains no agreement that the defendants in error will not be guilty of fraudulent or wrongful acts or of culpable negligence in their care of the book. It nowhere mentions these terms or makes any reference to the subjects which they suggest. It is only a bald, plain contract to keep the book in one of the places specified, and to produce it. The terms of this agreement seem to me too plain for construction. In my opinion, they bring these cases under the familiar rules that "where the parties have deliberately put their engagements into writing in such terms as to import a legal obligation without any uncertainty as to the object or extent of such an engagement, it is conclusively presumed that the whole engagement of the parties, and the manner and extent of their undertaking was reduced to writing," Thompson *vs.* Libby, 34 Minn., 374, 377; Barnes *vs.* U. P. R'y Co., 54 Fed., 87; 4 C. C. A., 199; 12 U. S. App., 17; Wilson *vs.* U. S. Cattle Ranch Co., 73 Fed., 994; 20 C. C. A., 244; 36 U. S. App., 634, 643, and that, "contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense." Imperial Fire Ins. Co. *vs.* Coos County, 151 U. S., 452, 463; Fred J. Kiesel *vs.* Sun Ins. Office of London, 88 Fed., 246.

Under these rules I am unable to find anything in this contract to indicate that the parties to it intended to make any other agreement than that which it so clearly expressed. Would it be any defense to an action upon an absolute promise to pay a debt that the debtor only intended to agree that he would not be guilty of any fraudulent act or culpable negligence which would prevent him from paying it and that he had not been? Would it be the province of the court in the absence of other evidence to construe a contract to build a house, to dig a well, to sell a horse, or to do any other act, into an agreement not to commit any fraudulent act or culpable negligence which would prevent the performance of the contract? The rule that courts may not make new contracts for parties which they never considered, and to which their minds never assented, answers these questions. The same rule seems to me to apply to an unconditional agreement to keep in a specified place and to produce a book. I can find in such a contract no evidence that the parties to it intended to make any other agreement. I
130 am unable to see in it any proof that they intended that the insured should not agree to keep and produce the book, but

that they should merely contract not to commit any fraudulent act or culpable negligence that would prevent them from keeping and producing it. The latter contract seems to me to be in the teeth of the former. It destroys the written agreement, and I cannot persuade myself in the face of its plain terms, that the minds of these parties ever met on a contract to so effectually abrogate it.

If this is the correct view of the meaning of this contract, it is immaterial whether its breach was caused by mistake, carelessness, from culpable negligence, or by an honest purpose to violate the agreement. By the terms of the agreement the insured voluntarily took upon themselves the chances of the effects of their own imprudence, carelessness, purpose and performance. The record conclusively shows that their failure to perform their contract was not caused by any act of God or the public enemy or by the interposition of any force which made it impossible for them to fulfill it. The breach is therefore without legal excuse and its inevitable consequence follows. The agreement was that no action should be maintained upon the policies if the book was not kept and produced. It is conceded on all hands that it was not kept and that it was not produced, and in my opinion, the insured were estopped by their agreement and by this fact from maintaining any action upon the policy. This view of the meaning and effect of the "iron-safe clause" of policies of insurance is sustained by the following authorities. They hold that it is "an express promissory warranty in the nature of a condition precedent," and that a strict compliance with its terms is indispensable to a recovery upon a policy which contains it. Western Assurance Co. *vs.* Altheimer, 58 Ark., 565, 575; Southern Ins. Co. *vs.* Parker, 61 Ark., 207, 215; Kelley-Goodfellow Shoe Co. *vs.* Liberty Ins. Co., 27 S. W. (Texas), 1027, 1031; American Fire Ins. Co. *vs.* First Nat. Bank, 30 S. W. (Texas), 384, 385; Ostrander on Insurance, sec. 238, and Landmann *vs.* Hartford Fire Ins. Co., 18 Insurance Law Journal (La.), 813, 815, in which the court pertinently said: "In this case there is no room for interpretation or construction; the language used in expressing the clause is free from ambiguity. It is printed in large type, annexed to the face of and is clearly a part of the policy. Its purpose was to enable the company, in case of loss, to procure satisfactory evidence of the extent of the loss, to protect it against unfounded augmentation of the value of the property destroyed and to enable it to obtain other evidence than that of the assured and his employees, however honest and correct they may be, of the damage sustained. Its purpose was, also, to enable the assured to make his loss mathematically certain, and protect him against unfounded deductions. It was the plain intention of the parties that in the case of loss, the books were to be the basis of the adjustment, and to enable them to be produced it was made a part of the policy that they should be kept in an iron safe.

"This the assured promised to do. The iron-safe clause in the policy is a promissory warranty. Being a warranty, a part of the contract, it is in the nature of a condition precedent to a right of recovery, and the parties whose rights are dependent upon such a

condition must show they have performed it. 'Agreements
131 legally entered into have the effect of laws on those who have formed them.' R. C. C., art. 1901.

"The court cannot add to or detract from the law they have made for themselves, or say that the promissory warranty shall not be enforced because it is not material. It is enough that the parties agreed to it, however foolish, improvident, or immaterial it may be."

Filed April 10, 1899.

132 And on the tenth day of April, A. D. 1899, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

MONDAY, *April* 10, 1899.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE Company, Plaintiff in Error,
vs.
T. K. KEARNEY and J. W. WYSE, Composing the Partnership Firm of Kearney and Wyse. } No. 1127.

In error to the United States court of appeals in the Indian Territory.

This cause came on to be heard on the transcript of the record from the United States court of appeals in the Indian Territory, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said United States court of appeals and the judgment of the United States court for the southern district of the Indian Territory in this cause be, and the same are each hereby, affirmed with costs, and that T. K. Kearney and J. W. Wyse, composing the partnership firm of Kearney and Wyse, have and recover against the Liverpool and London and Globe Insurance Company the sum of twenty dollars for their costs herein and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the United States court for the southern district of the Indian Territory for proceedings therein according to law and justice.

April 10, 1899.

133 And on the ninth day of June, A. D. 1899, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

In the Supreme Court of the United States.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Plaintiff in Error,
vs.
T. K. KEARNEY and J. W. WYSE, a Copartnership as Kearney & Wyse, Defendants in Error.

Assignment of Error.

Now comes the plaintiff in error, The Liverpool and London and Globe Insurance Company, and respectfully alleges that there are in the records and proceedings in this cause the following manifest errors occurring in the United States court for the southern district of the Indian Territory, at Ryan, in the United States court of appeals for the Indian Territory, at South McAlester, and in the United States circuit court of appeals for the eighth circuit, in St. Louis, Missouri, to wit:

I.

The trial court erred in permitting the plaintiff T. K. Kearney to testify as to the value of the goods, wares, and merchandise alleged to have been destroyed by fire; that the plaintiff had taken an inventory of the goods, wares, and merchandise, but had lost the same, and in permitting the witness to state what the inventory showed the goods, wares, and merchandise to be worth on the 1st day of January, 1894, or any other time; said witness, over the objection of the defendant in the trial court, testifying in respect to these matters as follows:

Q. How many goods did you have?
A. Between $10,000 and $12,000.
Q. Have you taken an inventory of your property—your stock—at any time?
A. Yes, sir; we had.
Q. When had you taken the last inventory?

Objected to as incompetent, irrelevant, and immaterial and not the best evidence. Overruled. Exception by defendant.

134 A. About the 1st of January, 1895, as well as I recollect.
Q. Where did you keep that inventory?
A. In that safe.
Q. Where is that inventory now?
A. I can't tell; lost.
Q. Where was it lost?

Objected to as incompetent, irrelevant, and immaterial. Overruled. Exception by defendant.

A. Lost it that night.
Q. What did that inventory show was the value of your stock of goods when it was taken 1st of January, 1894?

Objected to as immaterial, irrelevant, and incompetent, not the best evidence. Objection overruled. Exception by defendant.

Q. Was or was not that a correct inventory of the property at the time it was lost?

Objected to as incompetent, immaterial, and irrelevant and not the best evidence. Overruled. Exception.

All of said testimony being incompetent and inadmissible for the reason that the policy sued on, among other things, provided that "the assured, under this policy hereby covenants and agrees to keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business, and further covenants and agrees to keep such books and inventory in a securely locked iron safe at night and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to fire which would destroy the house where such business is carried on, and in case of loss the assured agrees and covenants to produce such books and inventory, and in the event of a failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

II.

The court erred in permitting the plaintiff Kearney to testify as follows:

Q. Mr. Kearney, in either one of these proofs of loss was the statement attached showing the amount of cash sales and credit sales and the amount of your purchase from the last inventory taken before the fire?

135 Objected to as incompetent, irrelevant, and immaterial and not the best evidence. Overruled. Exception by defendant.

A. Yes, sir.

III.

The trial court erred in permitting the plaintiff Kearney to testify as follows:

Q. Mr. Kearney, did you or not remove the books from that safe on that night?

Objected to as incompetent, irrelevant, and immaterial and leading and not proper under the issues in the cause, a waiver not being pleaded. Objection sustained in so far as it is leading.

Q. What did you do with your books that night the fire took place?

Objected to as incompetent, irrelevant, and immaterial and not proper under the issues in this case. Overruled. Exception.

A. When I saw we were going to burn, I went into the house, into the store, and got the books out of the safe.

Q. Where was the fire when you went in there, with reference to your house?

A. It was directly over north in a house opposite. We were on the south side.

Q. Your house was catching fire?

A. Yes, sir; a glass broke out as I went in there.

Q. What was your purpose in removing the books from that safe?

A. I wanted to remove the books; I thought it would be better to take them out than to run the risk of them in there.

Q. Did you or not endeavor to get all the books out of the safe and carry them to a place of safety?

Objected to as incompetent, irrelevant, and immaterial and not proper under the issues in this case. Overruled. Exception.

A. Yes, sir.

Q. Were there any other books lost except the inventory?

A. Yes, sir.

Q. Do you remember what other books?

Objected to as incompetent and immaterial and not proper under the issues in this case. Overruled. Exception.

A. I think so; an old cash book, and probably some other old day book or blotter.

136 Q. Did you or not intentionally leave that inventory in there, or any book in that room that night?

A. I did not.

Q. How large a book was that inventory?

A. It was a small book, paper back.

Q. About what was the weight of them, of all the books you had to carry?

Objected to as incompetent, irrelevant, and immaterial and not proper under the issues herein. Overruled. Exception.

A. About 125 pounds.

Q. The number of volumes?

A. No; I mean the weight.

Q. Were there a number of books?

A. Yes, sir; a number of them.

By the COURT: When did you first miss this book or discover you had lost it?

A. When the safe was opened after the fire.

By the COURT: Did you close the safe after taking the books out?

A. I just shut the door. I don't remember whether I bolted it or not.

By the COURT: Did you have other books left on the inside?

A. Yes, sir.

By the COURT: Were they preserved?

A. Yes, sir.

Mr. CRUCE: What was the condition of the books left in the safe?

A. We had an old book there that the back was slightly burned.

Mr. CRUCE: We now offer in evidence the proofs of loss and ask to read them to the jury.

Objected to as incompetent, irrelevant, and immaterial and not proper under the issues in the case. They have not shown that the original cannot be produced. Objection overruled. Exception by defendant, and proof of loss read to the jury.

All of said evidence being incompetent and inadmissible under the issues made by the pleading in the case and under the provisions of the policy sued on above quoted.

IV.

The trial court erred in permitting the witness Kearney to testify as follows:

Q. What effort was made to adjust the loss?

Objected to as incompetent, irrelevant, and immaterial and not proper under the issues in this case, as no waiver was pleaded. Objection overruled. Exception.

137 Q. State to the jury what effort was made between you and Mr. Van Valkenburg to adjust this loss.

Same objection and ruling as above.

A. He had Mr. McCoy to make up a statement. I helped him. We went through the book, and the statement was rendered to Mr. Van Valkenburg, and I had a meeting with him, and we tried to adjust it—at least I tried.

Q. What did he do?

A. He made a proposal——

Defendant objected to any proposal of compromise, as that forms no part of the issues in this case.

V.

The trial court erred in permitting the plaintiff T. K. Kearney, on direct examination, to testify as follows:

Q. About what was the value of the stock of goods in the wareroom?

Objected to as incompetent, irrelevant and immaterial, and not proper under the issues herein.

Q. At the date of the fire, I mean.

Same objection—not the best evidence. Overruled. Exception.

A. I suppose about $4,000.

Q. Those in the wareroom?

A. Yes, sir.

Q. About what do you estimate for the value of the goods in the brick building?

Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case. Overruled. Exception.

A. About $8,000.

VI.

The trial court erred in permitting said witness, Kearney, to testify as follows:

Q. You agreed in this iron-safe clause that you would keep these books and inventory in the fireproof safe at night and at all times when the stores mentioned in this policy is not actually in use, or that you would keep them in some secure place from a fire which would destroy the house. Where did you take these books after you removed them that night?

Objected to as incompetent, irrelevant, and immaterial. Objection overruled. Defendant excepts.

Q. Where did you take those books to?

A. Took them to my house.

138 Q. Was that property destroyed that night?

A. No, sir; the fire didn't reach that far.

Q. This slip of paper containing the iron-safe clause—is that part of your policy or is it a slip of paper different attached to your policy?

Objected to as incompetent, irrelevant, and immaterial.

Q. Is that slip of paper a part of that policy? Was that iron-safe clause in the original policy or is it a slip of paper attached to it?

Same objection. Overruled. Exception.

A. It is the paper attached to it.

Q. Is that slip of paper in fine or large print?

A. Fine print.

VII.

The trial court erred in permitting the witness Kearney to testify as follows:

Q. You had another book that did show the credit sales?

A. Yes, sir.

Objected to as incompetent, irrelevant and immaterial, and leading. Objection sustained in so far as it is leading.

Q. Is it not a fact that you kept a book showing the total sales, and that you could tell the total sales?

Objected to as unfair and leading. The books are the best evidence. He can produce the books and explain what the books show.

By the COURT: He had a right to re-examine him upon any matter brought out.

Q. Are you an expert book-keeper?
A. No, sir.
Q. Is Mr. Wyse?
A. No, sir.

Question and answer objected to as incompetent and immaterial.

Q. What is the truth, Mr. Kearney, as to whether or not these books you have here (I don't mean whether one book shows specifically the amount) show the total amount of cash sales?

Objected as leading.

Q. What is the truth as to whether or not the books you have there show the total amount of cash sales and credit sales from the time of the last inventory to the time of the fire?
A. They did.
Q. They do?
A. Yes, sir.

Said testimony being incompetent and inadmissible, be
139 cause it does not show a compliance with the clause of the policy sued on above quoted.

VIII.

The trial court erred in permitting J. W. Wyse, one of the plaintiffs, to testify as follows:

Q. Had you taken an inventory of that stock of goods?
A. We had taken an inventory, I think, about a year previous to the fire.
Q. About what time?
A. About January 1.

Question and answer objected to by the defendant as incompetent, irrelevant and immaterial, and not proper under the issues in the case to attempt to prove that an inventory was taken. Overruled. Exception taken.

Q. Where is that inventory now?
A. I don't know.
Q. Do you know how it got lost or destroyed?
A. Yes; it was destroyed in the fire, I suppose.
Q. Are you able to produce the inventory now?
A. No, sir.
Q. What was the value of your goods as per that inventory?

Objected to as incompetent, immaterial and irrelevant, and not the best evidence, and improper under the issues. Overruled. Exception.

A. About $9,000, I think.

IX.

The trial court erred in permitting J. W. Wyse, one of the plaintiffs, to testify as follows:

Q. Now, Mr. Wyse, what was the value of the goods in the brick house that night that they were destroyed by fire?

Objected to as incompetent, irrelevant, and immaterial and not the best evidence. Overruled. Exception.

A. About $8,000.

Q. About what was the value of the goods in the warehouse?

Same objection and ruling. Exception.

A. About $4,000.

All of said testimony being inadmissible because it does not show a compliance with the provisions of the policy above quoted.

X.

140 The trial court erred in permitting J. W. Wyse to testify as follows:

Q. Did or not that statement show Mr. Van Valkenburg the amount of your cash sales and your credit sales during the time since the last inventory?

Objected to as incompetent, irrelevant, and immaterial and not the best evidence. The books are the best evidence. Overruled. Exception by defendant.

Q. What is the truth as to whether or not he had a statement of that kind made by Mr. McCoy?

A. He had the statement made.

Q. Do you know where that statement is?

A. No, sir; we never had it after it was made.

Q. Is it in their possession?

A. Yes; I suppose so.

Question and answer objected to as incompetent, irrelevant, and immaterial. No effort made by plaintiffs' counsel to procure the original, if there was such; no demand made.

Q. What is the truth as to whether or not you made a demand upon the insurance company?

A. We made demand.

Q. Did they produce it?

Objected to as incompetent, irrelevant, and immaterial An oral demand is not contemplated by the statutes. Overruled. Exception.

A. No, sir.

Q. Now, Mr. Wyse, when did the local agent for the company, Mr. Mays, ascertain that your goods were destroyed by fire?

A. While the fire was burning he was there.

Q. When did you first talk to him about the loss?

Objected to as incompetent, irrelevant, and immaterial. Objection overruled. Exception taken.

A. While the fire was burning.

XI.

The trial court erred in refusing to strike out the two answers of the witness J. W. Wyse on his redirect examination, on page 37 of the transcript in the case, as follows:

Q. I believe you made a (stated you made a) statement to R. G. Dun & Co. from this inventory. Is that correct?

A. Yes, sir.

Q. Since the fire you have sent to R. G. Dun & Co. for a copy of it?

A. Yes, sir.

141 XII.

The trial court erred in charging the jury in its instructions-in-chief as follows, to wit:

Now, if they (plaintiffs), had been guilty of negligence in the discharge of their duty, in the discharge of the obligations imposed by the policy, they would not be entitled to recover, and that is a question you must pass on. It is contended by the plaintiffs that when the fire was on—a great fire, sweeping a whole town out of existence—in order to protect their records and books in accord with the obligations which this policy imposed upon them, they opened the safe and took from it all the books relating to the business, if it was in the safe, and in taking it out it was lost in the excitement and destroyed, you are instructed that the loss or destruction of that book and the failure to produce it would not in itself defeat the recovery. If there was a fraud perpetrated in its loss or destruction or the parties were guilty of any negligence or a sufficient want of care under the circumstances when the book was lost, that would be sufficient to defeat a recovery, but if they acted in good faith, with the use of diligence and care that business men usually employ, the loss of that book under the circumstances would not defeat a recovery, but they would be entitled to recover.

XIII.

The trial court erred in its charge-in-chief in instructing the jury as follows:

Now, if the plaintiffs kept such books and inventory locked in a fireproof safe on the night that the goods were destroyed by fire, and the plaintiffs for the purpose of better protecting said books and inventory attempted to remove them to some other secure place not exposed to a fire that would have destroyed the house in which the business was operated, and in such effort any part of the books were destroyed, plaintiffs were acting within the scope of authority granted them by the iron-safe clause of said policy.

XIV.

The trial court erred in refusing to give the following instruction requested by counsel for defendant:

142 I instruct you, gentlemen of the jury, under the evidence in this case plaintiffs are not entitled to recover and your verdict must be for the defendant.

XV.

The trial court erred in refusing to give the jury the following instruction requested by the defendant:

I instruct you, gentlemen of the jury, that the policy sued on in this action No. 10292, for the sum of $2,500, contains the iron-safe clause, which provides among other things that "the insured under the policy hereby covenants and agrees to keep a set of books showing a complete record of the business transacted, including all purchases and sales both for cash and on credit, together with the last inventory of said business, and covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the policy is not actually opened for business, or in some secure place not exposed to a fire which would destroy the house in which such business was carried on, and in case of loss the assured agrees to produce such books and inventory, and in the event of failure to produce the same the policy shall be null and void, and no suit or action at law shall be maintained thereon for any such loss." I further instruct you that this clause of the policy is a warranty on the part of the assured, and his failure to meet the requirements of said warranty in any particular avoids the policy, and a failure by the assured to produce in a case of loss the inventory as required by said warranty would defeat the plaintiffs' right of recovery, and said policy would be null and void.

XVI.

The trial court erred in refusing to give the jury the instruction the same as the last above mentioned in reference to the other policy sued on in the case No. 10348.

XVII.

The trial court erred in overruling defendant's motion for a new trial.

XVIII.

143 The plaintiff in error, The Liverpool & London & Globe Insurance Company, respectfully shows that the foregoing assignments of error are in substance and effect the same assignments of error presented to the United States court of appeals for the Indian Territory, and now here allege- that the said United States court of appeals for the Indian Territory erred in overruling the first assignment of error set out above.

XIX.

The United States court of appeals for the Indian Territory erred in overruling the second assignment of error presented therein, being the 12th assignment of error set out above.

XX.

Because the court erred in refusing to consider the other assignments of error presented in said United States court of appeals for the Indian Territory.

XXI.

The United States court of appeals for the Indian Territory erred in wholly disregarding the 14th assignment of error, wherein the action of the court below in refusing to instruct the jury to find for the defendant was requested, and also in wholly disregarding the 17th assignment of error and in the ruling of the court below in overruling defendant's motion for a new trial was requested. Under the first of these assignments of error, the plaintiff in error undertook to question the sufficiency of the evidence to sustain the verdict and judgment in this case, and in the 17th assignment of error the plaintiff in error undertook to question the action of the court below in overruling the motion for a new trial.

XXII.

Because the court erred in overruling its order made on the 25th day of June, 1898, in overruling the motion of plaintiffs in error for a rehearing in said cause.

XXIII.

The plaintiff in error, The Liverpool and London and Globe Insurance Company, respectfully shows that the foregoings assignments of error are in substance and effect the same assign-
144 ments of error presented to the United States court of appeals for the Indian Territory and to the United States circuit court of appeals for the eighth circuit in St. Louis, Missouri, and now we allege that the said United States court of appeals for the Indian Territory and the United States circuit court of appeals for the eighth circuit erred in overruling the first assignment of error as set out above.

XXIV.

The United States court of appeals for the eighth circuit erred in sustaining the ruling of the United States court of appeals for the Indian Territory and in overruling the second assignment of error presented therein, being the twelfth assignment of error set out above.

XXV.

That the United States circuit court of appeals for the eighth circuit erred in refusing to consider the other assignments of error

presented in the United States court of appeals for the Indian Territory.

XXVI.

The United States court of appeals of the eighth circuit erred in wholly disregarding the fourteenth assignment of error, wherein the action of the court below in refusing to instruct the jury to find for the defendant was requested.

XXVII.

The United States circuit court of appeals for the eighth circuit erred in sustaining the order of the United States court of appeals of the Indian Territory in overruling the seventeenth assignment of error and sustaining the ruling of said court in overruling defendant's motion for a new trial.

XXVIII.

The United States circuit court of appeals for the eighth circuit erred in sustaining the charge of the trial court to the jury, as set forth in assignment of error XII, herein.

XXIX.

The United States circuit court of appeals for the eighth
145 circuit erred in sustaining the ruling and instructions of the trial court to the jury, as set out in assignment of error XIII herein, which was as follows:

Now, if the plaintiffs kept such books and inventory locked in a fireproof safe on the night the goods were destroyed by fire, and the plaintiffs, for the purpose of better protecting said books and inventory, attempted to remove them to some more secure place not exposed to a fire that would have destroyed the house in which the business was operated, and in such effort any part of the books were destroyed, plaintiffs were acting within the scope of authority granted them by the iron-safe clause of said policy.

XXX.

The United States circuit court of appeals for the eighth circuit erred in sustaining the refusal of the trial court to give the jury the instructions requested by the defendant, as set forth in the 15th assignment of error herein.

XXXI.

The United States circuit court of appeals for the eighth circuit erred in affirming the judgment of the United States court for the Indian Territory and of the United States court of appeals for the Indian Territory.

XXXII.

The United States circuit court of appeals for the eighth circuit erred in disregarding each and all of the assignments of error herein

set out, the same being the same as filed in the United States circuit court of appeals and the United States court of appeals for the Indian Territory.

XXXIII.

The United States circuit court of appeals erred in rendering judgment for the respondents, T. K. Kearney and J. W. Wyse, partners as Kearney & Wyse, against The Liverpool and London and Globe Insurance Company, appellants.

XXXIV.

The United States circuit court of appeals for the eighth circuit erred in ordering and adjudging that the judgment of the United States court of appeals and the judgment of the United States
146 court for the southern district of the Indian Territory be affirmed, with costs. A certified copy of said judgment is hereto annexed and made a part of this assignment of errors, as will more fully appear from a certified copy of the record in the United States circuit court of appeals for the eighth circuit, which is hereto annexed and made a part of this assignment.

Respectfully submitted.

QUINTON & QUINTON,
Attorneys for Appellant.

E. S. QUINTON, *Of Counsel.*

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

MONDAY, *April* 10, 1899.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE Company, Plaintiff in Error,
vs.
T. K. KEARNEY and J. W. WYSE, Composing the Partnership Firm of Kearney and Wyse. } No. 1127.

In error to the United States court of appeals in the Indian Territory.

This cause came on to be heard on the transcript of the record from the United States court of appeals in the Indian Territory, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said United States court of appeals and the judgment of the United States court for the southern district of the Indian Territory in this cause be, and the same are each hereby, affirmed, with costs, and that T. K. Kearney and J. W. Wyse, composing the partnership firm of Kearney and Wyse, have and recover against the Liverpool and London and Globe Insurance Company the sum of twenty dollars for their costs herein and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the United States court for the southern district of the Indian Territory for proceedings therein according to law and justice.

April 10, 1899.

147 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing is a full, true, and complete copy of the judgment of the United States circuit court of appeals for the eighth circuit in the case of The Liverpool and London and Globe Insurance Company, plaintiff in error, *vs.* T. K. Kearney *et al.*, No. 1127, December term, 1898, as the same remains of record in my said office.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for [SEAL.] the eighth circuit, at the city of St. Louis, Missouri, this twenty-fourth day of May, A. D. 1899.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[Cancelled ten-cent internal revenue stamp.]

Endorsed: 1127. The Liverpool & London & Globe Insurance Co., plaintiff in error, *vs.* T. K. Kearney *et al.* Assignment of errors. Filed Jun 9, 1899. John D. Jordan, clerk.

And on the ninth day of June, A. D. 1899, an application for writ of error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

148 In the Supreme Court of the United States.

THE LIVERPOOL AND LONDON AND GLOBE Insurance Company, Appellant, *vs.* T. K. KEARNEY and J. W. WYSE, Partners as Kearney & Wyse, Respondents.	No. —. In the — Term, 1899.

Application for Writ of Error.

The Liverpool and London and Globe Insurance Company, appellant in the above-styled cause, deeming itself aggrieved by the various errors occurring on the trial of said cause in the United States court for the southern district of the Indian Territory, at Ryan, and in the United States court of appeals for the Indian Territory, at South McAlester, and especially by the order and judgment rendered in this cause on the 10th day of April, 1899, by the United States circuit court of appeals for the eighth circuit, in the city of St. Louis, Missouri, wherein the said appellees, Kearney & Wyse, a partnership firm composed of T. K. Kearney and J. W.

Wyse, recovered a judgment in the United States court at Ryan for the sum of $3,500.00 and $350.00 damages, with interest, at six per cent., from the 19th day of April, 1895, and by the judgment and order of the United States circuit court of appeals for the eighth circuit, at St. Louis and State of Missouri, rendered on the 10th day of April, 1899, wherein the said judgment of the United States court of appeals and the judgment of the United States court for the southern district of the Indian Territory were affirmed, *and* respectfully represents that the amount involved, excluding interest and costs, exceeds the sum of $1,000.00, and said cause was not instituted in the United States court of the Indian Territory on account of diverse citizenship.

Said appellant therefore prays for a writ or error from said judgment and decree of the United States circuit court of appeals of the eighth circuit, at St. Louis, State of Missouri, in the Supreme Court of the United States, in the city of Washington, D. C., and hereby prays that its writ of error be allowed; that the transcript of record, proceedings, and all papers upon which judgments, orders,
149 and decrees were made, duly authenticated, may be sent to the Supreme Court of the United States, at Washington, D. C.

QUINTON & QUINTON,
Attorneys for Appellant.

E. S. QUINTON, *Of Counsel.*

Endorsed: 1127. The Liverpool and London and Globe Insurance Co., plaintiff in error, *vs.* T. K. Kearney *et al.* Application for writ of error. Filed Jun- 9, 1899. John D. Jordan, clerk.

And on the ninth day of June, A. D. 1899, a bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

Know all men by these presents that we, The Liverpool and London and Globe Insurance Company and The American Bonding & Trust Company of Baltimore City, Maryland, are held and firmly bound unto T. K. Kearney and J. W. Wyse, composing the partnership firm of Kearney and Wyse, in the full and just sum of six thousand ($6,000) dollars, to be paid to the said T. K. Kearney and J. W. Wyse, partners as aforesaid, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day or May, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at the December term, A. D. 1898, of the United States circuit court of appeals for the eighth circuit, in a suit depending in said court between The Liverpool and London and Globe Insurance Company, plaintiff, and T. K. Kearney and J. W. Wyse, composing the partnership firm of Kearney and Wyse, defendants, judgment was rendered against the said The Liverpool and London and Globe Insurance Company, and the said The

Liverpool and London and Globe Insurance Company has obtained a writ of error & filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid
150 suit, and a citation directed to the said T. K. Kearney and J. W. Wyse, composing the partnership firm of Kearney & Wyse, citing and admonishing them to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said The Liverpool and London and Globe Insurance Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE LIVERPOOL AND LONDON AND GLOBE INS. CO., [SEAL.]
By QUINTON & QUINTON.
THE AMERICAN BONDING & TRUST COMPANY OF BALTIMORE CITY, MARYLAND, [SEAL.]
By JOHN V. ABRAHAMS, *Its Attorney.*

Sealed and delivered in presence of—

——— ———.

June 6, 1899.
Approved by—
JOHN M. HARLAN,
Asso. Jus. Sup. Ct. U. S.

[Thirty cents in internal-revenue stamps, cancelled.]

Power of Attorney from the American Bonding and Trust Company of Baltimore City to John V. Abrahams.

Know all men by these presents that the American Bonding and Trust Company of Baltimore City, a corporation created by and existing under the laws of the State of Maryland, of the city of Baltimore, Maryland, and duly authorized to act as sole surety in Indian Territory, have made, constituted, and appointed and by these presents doth make, constitute, and appoint John V. Abrahams, of Topeka, Kansas, its true and lawful attorney for and on behalf of the said corporation, as surety, to make, sign, and acknowledge a bond in the penalty of not exceeding the sum of seven thousand dollars, to be executed by Liverpool, London and Globe Insurance Company, as principal, conditioned for the prose-
151 cution to effect of a writ of error in the United States Supreme Court, in a case wherein the said Liverpool and London and Globe Insurance Company is plaintiff in error and T. K. Kearney & J. W. Wyse, composing the partnership firm of Kearney & Wyse, are defendants in error, and that said Liverpool and London & Globe Insurance Company shall answer all damages & costs if it fails to make good its plea, hereby approving, ratifying, and

confirming all that its said attorney may do or lawfully cause to be done in the premises by virtue of these presents.

In testimony whereof the American Bonding and Trust Company of Baltimore City has caused these presents to be signed by Jas. Bond, the president of said company, and its corporate seal to be hereunto affixed this the 27th day of May, 1899.

THE AMERICAN BONDING AND TRUST
[SEAL.] COMPANY OF BALTIMORE CITY,
By JAS. BOND, *President.*

Attest: SAMUEL H. SHRIVER, *Secretary.*

[Twenty-five-cent internal-revenue stamp, cancelled.]

STATE OF MARYLAND, }
City of Baltimore, } *ss:*

On this 27th day of May, A. D. 1899, before me, Howard Abrahams, the subscriber, a notary public for the State of Maryland, residing in Baltimore city, duly appointed to take proof and acknowledgment of deeds and other instruments, came James Bond, president, and Samuel H. Shriver, secretary, of the American Bonding and Trust Company of Baltimore City, to me personally known to be the individuals described in and who executed the preceding instrument, and they each duly acknowledged the execution of the same, and, being by me duly sworn, severally and each for himself deposeth and saith that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

152 In testimony whereof I have hereunto set my hand and affixed my notarial seal, at the city of Baltimore, the day
[SEAL.] and the year first above written.

HOWARD ABRAHAMS,
Notary Public.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *April* 7, 1897.

The annexed is a true copy of an original authorization to do business issued by the Attorney General under the act of Congress approved August 13, 1894.

[SEAL.] Witness my hand and the seal of the department.

CECIL CLAY,
Chief Clerk.

Whereas the American Bonding and Trust Company, a corporation duly incorporated under the laws of the State of Maryland, has deposited with me its charter or articles of incorporation and the statement required by section 3 of an act of Congress approved August 13, 1894, and entitled "An act relative to recognizances,

stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon," and has satisfied me that it has authority under its charter to do the business provided for in said act; that it has a paid-up capital of not less than $250,000.00 in cash or its equivalent, and that it is able to keep and perform its contracts:

Now, therefore, the said American Bonding and Trust Company is hereby granted authority to do business under said act in said State of Maryland, and is also granted authority to do business under said act beyond the limits of said State in any judicial district of the United States in which it shall first have appointed an agent conformably to the provisions of section 2 of said act.

JUDSON HARMON,
Attorney General.

Department of Justice, Washington, D. C., May 7, 1896.

153 Endorsed: U. S. circuit court of appeals, eighth circuit. No. 1127. The Liverpool and London and Globe Insurance Co., plaintiff in error, *vs.* T. K. Kearney *et al.* Bond on writ of error. Filed Jun- 9, 1899. John D. Jordan, clerk.

And on the ninth day of June, A. D. 1899, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause; which writ of error, with the clerk's return endorsed thereon, is hereto attached and herewith returned:

154 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Liverpool and London and Globe Insurance Company, plaintiff in error, and T. K. Kearney and J. W. Wyse, composing the partnership firm of Kearney & Wise, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 6th day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

June 6th, 1899.

[Endorsed:] Original. 1127. The Liverpool and London and Globe Insurance Co., plaintiff in error, *vs.* T. K. Kearney *et al.* Writ of error. Filed Jun- 9, 1899. John D. Jordan, clerk.

Return to Writ.

UNITED STATES CIRCUIT COURT OF APPEALS, *Eighth Circuit,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this 17th day of June, A. D. 1899.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

155 And on the sixteenth day of June, A. D. 1899, a citation, with proof of service endorsed thereon, was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

156 UNITED STATES OF AMERICA, *ss:*

To T. K. Kearney and J. W. Wyse, composing the partnership firm of Kearney & Wyse, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Liverpool and London and Globe Insurance Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the

Supreme Court of the United States, this 6th day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

On this 13th day of June, 1 in the year of our Lord one thousand eight hundred and ninety-nine, personally appeared W. A. Ledbetter before me, the subscriber, *W. A. Ledbetter* who is well known to me, and makes oath that he delivered a true copy of the within citation to A. C. Cruce, Esq., the attorney of record in the within-described cause for T. K. Kearney and J. W. Wyse, composing the partnership firm of Kearney and Wyse.

W. A. LEDBETTER.

Sworn to and subscribed the 13 day of June, A. D. 1899.

[Seal of Notary Public, Indian Ter., 3rd Judicial Division.]

T. H. STURGEON,
Notary Public.

[Endorsed:] U. S. circuit court of appeals, eighth circuit. No 1127. Liverpool and London and Globe Insurance Company, plaintiff in error, *vs.* T. K. Kearney *et al.* Citation. Filed Jun- 16, 1899. John D. Jordan, clerk.

157 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing one hundred and fifty-six pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said United States circuit court of appeals, in the case of The Liverpool and London and Globe Insurance Company, plaintiff in error, *vs.* T. K. Kearney and J. W. Wyse, composing the partnership firm of Kearney and Wyse, No. 1127, December term, 1898, as the same remain on file and of record in my office.

I do further certify that the original writ of error, with the clerk's return thereon, and the original citation, with proof of service endorsed thereon, are hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, this seventeenth day of June, A. D. 1899.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled June 17, '99. J. D. J.]

Endorsed on cover: File No., 17,447. U. S. C. C. of appeals, 8th circuit. Term No., 333. The Liverpool & London and Globe Insurance Company, plaintiff in error, *vs.* T. K. Kearney and J. W. Wyse, composing the partnership firm of Kearney & Wyse. Filed June 26, 1899.

10613

No. 85.

Brf. of Quinton for

Office Supreme Court U.S.
FILED
NOV 1 1900
JAMES H. McKENNEY,
Clerk.

Filed Nov. 1, 1900.

SUPREME COURT OF THE UNITED STATES.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, *Plaintiff in Error*,

vs.

T. K. KEARNEY AND J. W. WYSE, COMPOSING THE PARTNERSHIP FIRM OF KEARNEY & WYSE, *Defendants in Error*.

No. ~~XXX~~ 85

BRIEF OF PLAINTIFF IN ERROR.

QUINTON & QUINTON
Solicitors for Appellant.

E. S. QUINTON,
Of Counsel.

CRANE & CO., TOPEKA.

SUPREME COURT OF THE UNITED STATES.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, *Plaintiff in Error*,
vs.
T. K. KEARNEY AND J. W. WYSE, COMPOSING THE PARTNERSHIP FIRM OF KEARNEY & WYSE, *Defendants in Error.*
No. 333.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This suit was brought in the United States Court for the Southern District of the Indian Territory, at Ryan, by the defendants in error, Kearney & Wyse, a partnership, against The Liverpool and London and Globe Insurance Company, upon two policies of insurance, which were exactly the same in all matters and form and condition, seeking to recover the sum of $3,500 for a loss alleged to have occurred under and by virtue of said policies. The plaintiffs below, defendants in error, alleged a full compliance with all the conditions precedent to their right of recovery. The defendants, answering thereto, admitted

the issuance of the policies, but interposed a general denial, pleading specially the iron-safe clause of said policies, among other things, to wit:

"IRON-SAFE CLAUSE.—*The assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business was carried on; and in case of loss, the assured agrees and covenants to produce such books and inventory; and in the event of the failure to produce the same this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss.*" (Page 6.)

Further answering, denied that the plaintiffs below kept a set of books, as required by the said iron-safe clause; and further answering that the said defendants in error, plaintiffs below, upon demand being made by the company after loss was claimed to have occurred, for the said books, as required by the policies, refused and failed to furnish the books as required by said policies and necessary for the determination of said loss; and upon the failure of the plaintiffs below, defendants in error, to comply with the terms of the policies in furnishing the said books and keeping the same, as required by the said iron-safe clause,

that the plaintiffs below were not entitled to recover on said policies of insurance.

Upon these issues joined, trial was had on the 23d day of September, 1895. At the trial of the case plaintiffs did not produce as proofs of their loss the set of books, as required by said iron-safe clause, but attempted to prove the amount of their loss by oral testimony, admitting that they had no inventory and that they did not keep a complete set of books, and gave as their reason for not producing the books upon demand by the insurance company for the same after loss, and for the non-production of the same at the trial of this case, that at the time of the fire, and between two and three o'clock at night, the said defendants in error, plaintiffs below, went to their store, opened their iron safe, and took out certain books and carried them away, leaving certain books in the safe; and in their removal of the books from the safe at that time of night they lost the inventory, as required by the said policies, and were unable to furnish it; but that the books they left in the safe were not destroyed by the fire.

Whereupon the court allowed them to prove the amount of their loss and make such proof as they might desire, of their own knowledge, of a loss occurring under the policies on which they were seeking to recover in that action; defendant contending, as the policies provide:

"In the event of the failure to produce the books and inventory this policy shall be null and void, and no suit

or action at law shall be maintained thereon for any such loss."

Defendant (plaintiff in error) demurred to the evidence of plaintiff, and moved a non-suit which was denied, and defendant stood upon the demurrer and motion, introducing no evidence.

Thereupon, defendants in error, by consideration of said court, recovered judgment upon said policies against the plaintiff in error. From this judgment plaintiff in error appealed to the United States Court of Appeals for the Indian Territory, at South McAlester; and on the 14th day of June, 1898, the United States Court of Appeals for the Indian Territory at South McAlester affirmed the judgment of the court below; and on the 25th day of June, 1898, a motion for new trial was filed, heard and overruled, and an appeal was prosecuted to the United States Circuit Court of Appeals, Eighth Circuit.

ASSIGNMENTS OF ERROR.

Now comes the plaintiff in error, The Liverpool and London and Globe Insurance Company, and respectfully alleges that there are in the records and proceedings in this cause the following manifest errors occurring in the United States District Court for the Southern District of the Indian Territory at Ryan, and in the United States Court of Appeals for the Indian Territory at South McAlester, and the United States Circuit Court of Appeals, Eighth Circuit, to wit:

I.

The trial court erred in permitting the plaintiff, T. K. Kearney, to testify as to the value of the goods, wares and merchandise alleged to have been destroyed by fire; that the plaintiff had taken an inventory of the goods, wares and merchandise, but had lost the same, and in permitting the witness to state what the inventory showed the goods, wares and merchandise to be worth on the 1st day of January, 1894, or at any other time, said witness, over the objection of the defendant in the trial court, testifying in respect to these matters as follows:

Q. How many goods did you have? A. Between $10,000 and $12,000.

Q. Had you taken an inventory of your property, your stock at any time? A. Yes, sir, we had.

Q. When had you taken the last inventory?

[Objected to as incompetent, irrelevant and immaterial, and not the best evidence. Overruled. Exception by defendant.]

A. About the 1st of January, 1894, as well as I recollect.

Q. Where did you keep that inventory? A. In that safe.

Q. Where is that inventory now? A. I can't tell—lost.

Q. Where was it lost?

[Objected to as incompetent, irrelevant and immaterial. Overruled. Exception by defendant.]

A. Lost it that night.

Q. What did that inventory show was the value of your stock of goods when it was taken 1st of January, 1894?

[Objected to as incompetent, irrelevant and immaterial, not the best evidence. Objection overruled. Exception by defendant.]

Q. Was or was not that a correct inventory of the property at the time it was lost?

[Objected to as incompetent, irrelevant and immaterial, and not the best evidence. Overruled. Exception.]

(Pages 11–13.)

All of said testimony being incompetent and inadmissible, for the reason that the policy sued on, among other things, provided that "the assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory in a securely locked iron safe at night and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to fire which would destroy the house where such business is carried on; and in case of loss the assured agrees and covenants to produce such books and inventory; and in the event of a failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

II.

The court erred in permitting the plaintiff, Kearney, to testify as follows:

Q. Mr. Kearney, in either one of these proofs of loss, was the statement attached showing the amount of cash

sales and credit sales and the amount of your purchase from the last inventory taken before the fire?

[Objected to as incompetent, irrelevant and immaterial, and not the best evidence. Overruled. Exception by defendant.]

A. Yes, sir. (Page 15.)

III.

The trial court erred in permitting the plaintiff, Kearney, to testify as follows:

Q. Mr. Kearney, did you or not remove the books from that safe on that night?

[Objected to as incompetent, irrelevant and immaterial, and leading, and not proper under the issues in this cause, a waiver not being pleaded. Objection sustained in so far as it is leading.]

Q. What did you do with your books that night the fire took place?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case. Overruled. Exception.]

A. When I saw we were going to burn, I went into the house, into the store, and got the books out of the safe.

Q. Where was the fire when you went in there with reference to your house? A. It was directly over north, in a house opposite. We were on the south side.

Q. Your house was catching fire? A. Yes, sir, a glass broke out as I went in there.

Q. What was your purpose in removing the books from the safe? A. I wanted to remove the books. I thought it would be better to take them out than to run the risk of leaving them in there.

Q. Did you or not endeavor to get all the books out of the safe and carry them to a place of safety?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case. Overruled. Exception.]

A. Yes, sir.

Q. Were there any other books lost except the inventory? A. Yes, sir.

Q. Do you remember what other books?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case. Overruled. Exception.]

A. I think so. An old cash-book, and probably some other old day-book or blotter.

Q. Did you or not intentionally leave that inventory in there, or any book in that room that night? A. I did not.

Q. How large a book was that inventory? A. It was a small book, paper back.

Q. About what was the weight of them, of all the books you had to carry?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues herein. Overruled. Exception.]

A. About 125 pounds.

Q. The number of volumes? A. No, I mean the weight.

Q. Were there a number of books? A. Yes, sir, a number of them.

By the Court: When did you first miss this book, or discover you had lost it? A. When the safe was opened after the fire.

By the Court: Did you close the safe after taking the books out? A. I just shut the door. I don't remember whether I bolted it or not.

By the Court: Did you have other books left on the inside? A. Yes, sir.

By the Court: Were they preserved? A. Yes, sir.

Mr. Cruce: What was the condition of the books left in the safe? A. We had an old book there that the back was slightly burned.

Mr. Cruce: We now offer in evidence the proofs of loss, and ask to read them to the jury.

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case. They have not shown that the original cannot be produced. Objection overruled. Exception by defendant, and proof of loss read to the jury.] (Pages 15–17.)

All of said evidence being incompetent and inadmissible under the issues made by the pleading in the case and under the provisions of the policy sued on above quoted.

IV.

The trial court erred in permitting the witness, Kearney, to testify as follows:

Q. What effort was made to adjust the loss?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case, as no waiver was pleaded. Objection overruled. Exception.]

Q. State to the jury what effort was made between you and Mr. Van Valkenburgh to adjust this loss.

[Same objection and ruling as above.]

A. He had Mr. McCoy to make up a statement. I helped him. We went to the book and the statement was rendered to Mr. Van Valkenburg, and I had a meeting with him and we tried to adjust it (at least I tried).

Q. What did he do? A. He made a proposal.

[Defendant objected to any proposal of compromise, as that forms no part of the issues in this case.] (Page 17.)

V.

The trial court erred in permitting the plaintiff, T. K. Kearney, on direct examination to testify as follows:

Q. About what was the value of the stock of goods in the wareroom?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues herein.]

Q. At the date of the fire, I mean?

[Same objection—not the best evidence. Overruled. Exception.]

A. I suppose about $4,000.

Q. Those in the wareroom? A. Yes, sir.

Q. About what do you estimate for the value of the goods in the brick building?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case. Overruled. Exception.]

A. About $8,000. (Page 24.)

VI.

The trial court erred in permitting said witness, Kearney, to testify as follows:

Q. You agreed in this iron-safe clause that you would keep these books and inventory in the fireproof safe at night, and at all times when the store mentioned in this policy is not actually in use, or that you would keep them in some secure place from a fire which would destroy the house. Where did you take these books after you removed them that night?

[Objected to as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.]

Q. Where did you take these books to? A. Took them to my house.

Q. Was that property destroyed that night? A. No, sir; the fire didn't reach that far.

Q. This slip of paper containing the iron-safe clause—is that part of your policy, or is it a slip of paper different attached to your policy?

[Objected to as incompetent, irrelevant and immaterial.]

Q. Is that slip of paper a part of that policy? Was that iron-safe clause in the original policy, or is it a slip of paper attached to it?

[Same objection. Overruled. Exception.]

A. It is the paper attached to it.

Q. Is that slip of paper in fine or large print? A. Fine print.

(Pages 24, 25.)

VII.

The trial court erred in permitting the witness, Kearney, to testify as follows:

Q. You had another book that did show the credit sales? A. Yes, sir.

[Objected to as incompetent, irrelevant, and immaterial and leading. Objection sustained in so far as it is leading.]

Q. Is it not a fact that you keep a book showing the total sales, and that you could tell the total sales?

[Objected to as unfair and leading. The books are the best evidence. He can produce the books and explain what the books show.]

By the Court: He had a right to re-examine him upon any matter brought out.

Q. Are you an expert bookkeeper? A. No, sir.

Q. Is Mr. Wyse? A. No, sir.

[Question and answer objected to as incompetent and immaterial.]

Q. What is the truth, Mr. Kearney, as to whether or not these books you have here (I don't mean whether one book shows specifically the amount) show the total amount of cash sales?

[Objected to as leading.]

Q. What is the truth as to whether or not the books you have there show the total amount of cash sales and credit sales from the time of the last inventory to the time of the fire? A. They did.

Q. They do? A. Yes, sir. (Page 25.)

Said testimony being incompetent and inadmissible, because it does not show a compliance with the clause of the policy sued on above quoted.

VIII.

The trial court erred in permitting J. W. Wyse, one of the plaintiffs, to testify as follows:

Q. Had you taken an inventory of that stock of goods? A. We had taken an inventory, I think, about a year previous to the fire.

Q. About what time? A. About January 1st.

[Question and answer objected to by the defendant as incompetent, irrelevant and immaterial, and not proper under the issues in the case to attempt to prove that an inventory was taken. Overruled. Exception taken.]

Q. Where is that inventory now? A. I don't know.

Q. Do you know how it got lost or destroyed? A. Yes. It was destroyed in the fire, I suppose.

Q. Are you able to produce the inventory now? A. No, sir.

Q. What was the value of your goods as per that inventory?

[Objected to as incompetent, irrelevant and immaterial, and not the best evidence and improper under the issues. Overruled. Exception.]

A. About $9,000, I think. (Page 27.)

IX.

The trial court erred in permitting J. W. Wyse, one of the plaintiffs, to testify as follows:

Q. Now, Mr. Wyse, what was the value of the goods in the brick house that night that they were destroyed by fire?

[Objected to as incompetent, irrelevant and immaterial, and not the best evidence. Overruled. Exception.]

A. About $8,000.

Q. About what was the value of the goods in the warehouse?

[Same objection and ruling. Exception.]

A. About $4,000.

All of said testimony being inadmissible, because it does not show a compliance with the provisions of the policy above quoted. (Page 28.)

X.

The trial court erred in permitting J. W. Wyse to testify as follows:

Q. Did or not that statement show Mr. Van Valkenburg the amount of your cash sales and your credit sales during the time since the last inventory?

[Objected to as incompetent, irrelevant and immaterial, and not the best evidence. The books are the best evidence. Overruled. Exception by the defendant.]

Q. What is the truth as to whether or not he had a statement of that kind made by Mr. McCoy? A. He had the statement made.

Q. Do you know where that statement is? A. No, sir. We never had it after it was made.

Q. It is in their possession? A. Yes, I suppose so.

[Question and answer objected to as incompetent, irrelevant and immaterial. No effort made by plaintiff's counsel to procure the original, if there was such. No demand made.]

Q. What is the truth as to whether or not you made a demand upon the insurance company? A. We made demand.

Q. Did they produce it?

[Objected to as incompetent, irrelevant and immaterial. An oral demand is not contemplated by the statutes. Overruled. Exception.]

A. No, sir.

Q. Now, Mr. Wyse, when did the local agent for the company, Mr. Mays, ascertain that your goods were destroyed by fire? A. While the fire was burning he was there.

Q. When did you first talk to him about the loss?

[Objected to as incompetent, irrelevant and immaterial. Objection overruled. Exception taken.]

A. While the fire was burning. (Pages 28, 29.)

XI.

The trial court erred in refusing to strike out the two answers of the witness, J. W. Wyse, on the re-direct examination, on page 34 of the transcript in this case, as follows:

Q. I believe you made a (stated you made a) state-

ment to R. G. Dun & Company from this inventory. Is that correct? A. Yes, sir.

Q. Since the fire have you sent to R. G. Dun & Company for a copy of it? A. Yes, sir.

XII.

The trial court erred in a statement to the jury as follows:

"The principal question you are called upon to determine in this case, and about the only question—material question of fact—is, whether under this policy the plaintiffs Kearney & Wyse have in the *main* complied with the terms of the policy." (Page 74.)

XIII.

The court further erred in making the statement to the jury found on pages 65 and 66 of the record, which is as follows:

"Under the exact terms of the policy—and the exacting terms of it, I may add—they were required to keep a complete set of books, by which they could exemplify every day's transactions of their business; and they were required to keep a book containing an inventory last made by the plaintiffs before the fire. They have produced a set of books, an explanation of which you have heard made by the plaintiffs, *and seems* to be substantially in compliance *with the terms of the policy upon that subject.*"

XIV.

The trial court erred in charging the jury in its instructions in chief as follows, to wit:

"Now, if they [plaintiffs] had been guilty of negligence

in the discharge of their duty, in the discharge of the obligations imposed by the policy, they would not be entitled to recover, and that is a question you must pass on. It is contended by the plaintiffs that when the fire was on, a great fire, sweeping a whole town out of existence, in order to protect their records and books in accord with the obligations which this policy imposed upon them, they opened the safe and took from it all the books relating to the business, if it was in the safe, and in taking it out, it was lost in the excitement and destroyed. You are instructed that the loss or destruction of that book, and the failure to produce it would not in itself defeat the recovery. If there was a fraud perpetrated in its loss or destruction, or the parties were guilty of any negligence, or a sufficient want of care under the circumstances, when the book was lost, that would be sufficient to defeat a recovery; but if they acted in good faith, with the use of diligence and care that business men usually employ, the loss of that book, under the circumstances, would not defeat a recovery, but they would be entitled to recover." (Page 66.)

XV.

The trial court erred in its charge in chief in instructing the jury as follows:

"Now, if the plaintiffs kept such books and inventory locked in a fire-proof safe on the night that the goods were destroyed by fire, and the plaintiffs, for the purpose of better protecting said books and inventory, attempted to remove them to some other secure place not exposed to a fire that would have destroyed the house in which the business was operated, and in such effort, any part of the books were destroyed, plaintiffs were acting within the scope of authority granted them by the iron-safe clause of said policy." (Page 67.)

XVI.

The trial court erred in refusing to give the following instruction, requested by counsel for defendant:

"I instruct you, gentlemen of the jury, under the evidence in this case, plaintiffs are not entitled to recover, and your verdict must be for the defendant."

(Page 68.)

XVII.

The trial court erred in refusing to give the jury the following instruction, requested by the defendant:

"I instruct you, gentlemen of the jury, that the policy sued on in this action, No. 10,292, for the sum of $2,500, contains the iron-safe clause, which provides, among other things, that 'the insured under the policy hereby covenants and agrees to keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and on credit, together with the last inventory of said business, and covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house in which such business was carried on; and in case of loss, the assured agrees to produce such books and inventory; and in the event of failure to produce the same, the policy shall be null and void, and no suit or action at law shall be maintained thereon for any such loss.' I further instruct you that this clause of the policy is a warranty on the part of the assured, and his failure to meet the requirements of said warranty in any particular avoids the policy; and a failure by the assured to produce in a case of loss the inventory as required by said warranty

would defeat the plaintiff's right of recovery, and said policy would be null and void." (Page 68.)

XVIII.

The trial court erred in refusing to give the jury the instruction, the same as the last above mentioned, in reference to the other policy sued on, in the case No. 10,348.

XIX.

The trial court erred in overruling defendant's motion for a new trial. (Page 69.)

XX.

The plaintiff in error, The Liverpool and London and Globe Insurance Company, respectfully shows that the foregoing assignments of error are in substance and effect the same assignments of error presented to the United States Court of Appeals for the Indian Territory, and now here alleges that the said United States Court of Appeals for the Indian Territory and the United States Circuit Court of Appeals of the Eighth Circuit erred in overruling the first assignment of error set out above.

XXI.

The United States Court of Appeals for the Indian Territory erred in holding "That a strict compliance with the conditions of the iron-safe clause was not required, but if there is a substantial compliance with these covenants the assured will be entitled to recover. (*Brown v. Palatine Ins. Co.*, 35 S. W. 1960.)"

The same is not the law of this case, and the authority referred to does not decide what the court claim for it.

XXII.

The United States Court of Appeals for the Indian Territory erred in overruling the 2d assignment of error presented therein, being the 14th assignment of error set out above.

XXIII.

Because the court erred in refusing to consider the other assignments of error presented in said United States Court of Appeals for the Indian Territory.

XXIV.

The United States Court of Appeals for the Indian Territory erred in wholly disregarding the 16th assignment of error, wherein the action of the court below in refusing to instruct the jury to find for the defendant was requested; and also in wholly disregarding the 19th assignment of error, and in the ruling of the court below in overruling defendant's motion for a new trial. Under the first of these assignments of error the plaintiff in error undertook to question the sufficiency of the evidence to sustain the verdict and judgment in this case, and in the 19th assignment of error the plaintiff in error undertook to question the action of the court below in overruling the motion for a new trial.

XXV.

Because the court erred in its order made on the 25th day of June, 1898, overruling the motion of plaintiff in error for a rehearing in said cause.

XXVI.

The plaintiff in error, The Liverpool and London and Globe Insurance Company, respectfully shows that the foregoing assignments of error are in substance and effect the same assignments of error presented to the United States Court of Appeals for the Indian Territory, and now here allege that the said United States Court of Appeals for the Indian Territory erred in overruling the first assignment of error set out above.

XXVII.

The United States Court of Appeals for the Indian Territory erred in overruling the second assignment of error presented therein, being the 12th assignment of error set out above.

XXVIII.

Because the court erred in refusing to consider the other assignments of error presented in said United States Court of Appeals for the Indian Territory.

XXIX.

The United States Court of Appeals for the Indian Territory erred in wholly disregarding the 14th assign-

ment of error, wherein the action of the court below in refusing to instruct the jury to find for the defendant was requested, and also in wholly disregarding the 17th assignment of error, and in the ruling of the court below in overruling defendant's motion for a new trial was requested. Under the first of these assignments of error the plaintiff in error undertook to question the sufficiency of the evidence to sustain the verdict and judgment in this case, and in the 17th assignment of error the plaintiff in error undertook to question the action of the court below in overruling the motion for a new trial.

XXX.

Because the court erred in overruling its order made on the 25th day of June, 1898, in overruling the motion of plaintiffs in error for a rehearing in said cause.

XXXI.

The plaintiff in error, The Liverpool and London and Globe Insurance Company, respectfully shows that the foregoing assignments of error are in substance and effect the same assignments of error presented to the United States Court of Appeals for the Indian Territory and to the United States Circuit Court of Appeals for the Eighth Circuit in St. Louis, Missouri, and now we allege that the said United States Court of Appeals for the Indian Territory and the United States Circuit Court of Appeals for the Eighth Circuit erred in overruling the first assignment of error as set out above.

XXXII.

The United States Circuit Court of Appeals for the Eighth Circuit erred in sustaining the ruling of the United States Court of Appeals for the Indian Territory and in overruling the second assignment of error presented therein, being the twelfth assignment of error set out above.

XXXIII.

That the United States Circuit Court of Appeals for the Eighth Circuit erred in refusing to consider the other assignments of error presented in the United States Court of Appeals for the Indian Territory.

XXXIV.

The United States Court of Appeals for the Eighth Circuit erred in wholly disregarding the fourteenth assignment of error, wherein the action of the court below in refusing to instruct the jury to find for the defendant was requested.

XXXV.

The United States Circuit Court of Appeals for the Eighth Circuit erred in sustaining the order of the United States Court of Appeals for the Indian Territory in overruling the seventeenth assignment of error and sustaining the ruling of said court in overruling defendant's motion for a new trial.

XXXVI.

The United States Circuit Court of Appeals for the Eighth Circuit erred in sustaining the charge of the trial court to the jury, as set forth in assignment of error XII, herein.

XXXVII.

The United States Circuit Court of Appeals for the Eighth Circuit erred in sustaining the ruling and instructions of the trial court to the jury, as set out in assignment of error XIII herein, which was as follows:

"Now, if the plaintiffs kept such books and inventory locked in a fire-proof safe on the night the goods were destroyed by fire, and the plaintiffs, for the purpose of better protecting said books and inventory, attempted to remove them to some more secure place not exposed to a fire that would have destroyed the house in which the business was operated, and in such effort any part of the books were destroyed, plaintiffs were acting within the scope of authority granted them by the iron-safe clause of said policy."

The United States Circuit Court of Appeals for the Eighth Circuit erred in sustaining the refusal of the trial court to give the jury the instructions requested by the defendant, as set forth in the 15th assignment of error herein.

XXXIX.

The United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the judgment of the United States Court for the Indian Territory and of the United States Court of Appeals for the Indian Territory.

XL.

The United States Circuit Court of Appeals for the Eighth Circuit erred in disregarding each and all of the assignments of error herein set out, the same being the same as filed in the United States Circuit Court of Appeals and the United States Court of Appeals for the Indian Territory.

XLI.

The United States Circuit Court of Appeals erred in rendering judgment for the respondents, T. K. Kearney and J. W. Wyse, partners as Kearney & Wyse, against The Liverpool and London and Globe Insurance Company, appellants.

XLII.

The United States Circuit Court of Appeals for the Eighth Circuit erred in ordering and adjudging that the judgment of the United States Court of Appeals and the judgment of the United States Court for the Southern District of the Indian Territory be affirmed, with costs.

(Pages 123 to 134 inclusive, Transcript of Record.)

ARGUMENT.

I.

Three courts have passed upon the question in this case, each one assigning a different reason for its decision, and none of them sound. To the rules governing the construction of written contracts the greatest violence was done by the United States Circuit Court of Appeals, Eighth Circuit, by a divided court holding in effect that a party would be relieved from compliance with his part of the contract unless the other party to the contract could show and prove fraud in his failure to comply. That no one need comply with the terms and conditions of a contract by him to be performed in order to receive the benefits of the contract unless he was guilty of fraud, which the other party to the contract would have to prove.

The real question in this case is raised by the statements and instructions of the trial court under assignments of error 12, 13, 14, 15, which is, whether the iron-safe clause of the policies of insurance sued on in this action is a promissory warranty and must be strictly complied with or not; and under the instructions and rulings in this case it would be immaterial whether the claim had been made that from the facts shown a strict compliance

with the conditions of the policy was had by the insured, defendants in error, as that test of the question was taken out entirely by the statements and instructions by the court to the jury; it being admitted by the defendants in error and by the instructions of the court, that a strict compliance with the terms of the policy had not been made by the insured, in that they failed to keep a set of books as required by the policy, and absolutely failed to produce them. And in this case defendant introduced no evidence, but relied entirely upon the evidence of the plaintiffs, under proper construction of the policy, to defeat their recovery; and we will insist that there was not a substantial compliance, as a proposition of law, by the insured with the conditions of the policy. The policy provided, in brief:

That the insured should keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and credit, together with the *last inventory* of said business; and further covenants and agrees to keep such books and inventories securely locked in a fire-proof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and in case of loss by fire the assured agrees and covenants to produce such books *and inventory;* and in event of failure to produce the same, this policy shall be null and void, and no suit or action at law shall be maintained for any such loss.

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That they did not keep a set of books as required by the policy, is clearly shown by the evidence; but this we will discuss later on. The books that they did keep were kept in an iron safe, as shown by the evidence, until the night of the fire; and upon the night of the fire, between two and three o'clock at night, they went to the safe and took out some of the books and carried them away, leaving the door of the safe open and leaving some of the books in the safe. The books left in the safe were not destroyed by the fire, even when the door was left open; but in carrying the books away they claim they lost the very books required to be kept by the policy, and therefore could not produce them. This is their undisputed testimony; and the question arises, even under the instructions of the court, Was this a substantial compliance with the terms of the policy? Whose fault was it that the books were lost or destroyed in taking them away from the safe at that time of night? If the insured attempted to act contrary to the terms or conditions of the policy, or do anything more than was required by the terms and conditions of the policy, they must certainly be held to have assumed all risk and liability that would flow from their acts, regardless of what their intention might have been. They were forbidden, by the terms of the policy, from removing or attempting to remove, for any reason, the books from the place where they were designated and required to be kept after business hours; and should they

exercise their judgment as to which should be the better place, at that time of night, they are then violating the terms of the policy and must assume the risk for so doing.

Nothing can prove this proposition stronger than the facts as they state them to be: that the books left in the safe were not destroyed by the fire, even though the door was left open. They had their choice, and warranted to either keep those books in an iron safe or some other place equally secure; and when they selected the iron safe and placed them in there at the close of business that day they had no right, under the terms of the policy, to exercise their judgment over the control of those books during the night-time or until the next day; and if they had left them in the safe, as the policy required, they would have complied strictly with the terms of the policy and could have produced the books for examination, and proofs of loss in this case. When they assume to go to the store at two or three o'clock at night and remove the books from the safe, where they had warranted to keep them, without the knowledge or consent or approval of the company, they then assume all risk and liability that must naturally flow from their acts in so doing; and having admitted by the evidence that under these circumstances, moving the books from the safe at that time of night, they lost and destroyed the books, and were thereby prevented from producing them as proofs required by the policy,

they cannot make the company assume the responsibility or any part of the same for the loss of such books, but must assume it themselves, and therefore it is not a substantial, even under the instructions of the court, compliance with the terms of the policy.

But we insist that a substantial compliance with the terms of the policy or the iron-safe clause, as set out above, is not a correct proposition of law; but that it is a promissory warranty, and must be strictly complied with within the meaning of the decisions of the court in 38 Federal Reporter, page 21, where the court say:

"But after the business of the day is over and there is no longer occasion to use the books, and the store is closed for the night, there is no hardship in requiring that they shall not be left to the hazard of destruction by fire."

In that case, however, the store had not been closed for the night, and this court held it a strict compliance; but in this case the question upon which the decision in the case of *Jones v. Southern Insurance Company*, 38 Federal Reporter, page 21, was based, does not arise, for the reason that the store was closed for the night and business at an end, and they did not have, according to the customs of merchants or any custom, a right to remove the books from the same, because they were in a fire-proof safe, right where they should be to be properly guarded and protected against fire. The Supreme Court of Arkansas, Vol. 61, Ark. Re-

ports, page 213, has placed the same construction upon the decision above referred to, that we have given when they say:

"The covenant to keep the books in a fire-proof safe at night or in some place secure from fire was recognized as valid and binding; but it was said that the proper construction of that clause was not that the books shall be kept in a safe from sunset to sunrise, but they shall be so kept from the time the business of the day is ended and the store closed for the night. This construction did no violence to the clause of the policy by which the assured obligated himself to keep his books in a fire-proof safe at night," etc.

The court further deciding (page 214):

"The object and meaning of the clause of the policy under consideration is, we think, free from doubt. It in effect stipulates that the assured shall keep his books in a fire-proof safe, not only at night, but at all other times when the store is not actually open for business. The object in requiring a set of books to be kept, showing a record of the business transacted, and of the changes taking place from day to day in the stock of goods assured, is very patent. Without such a record the insurer has no means of ascertaining the amount or value of the goods destroyed and for which he is liable. Making such a record is of no value unless it can be preserved from the fire that destroys the property. To guard against this the appellee in this case covenanted that he would keep such books securely locked in a fire-proof safe at night and at all times when the store mentioned in the policy was not actually open for business, and that in case of loss he would produce the books."

The court further citing 58 Ark. 575, *Western Assur-*

ance Co. v. Altheimer, where the court said, speaking of this provision:

"The stipulations of the iron-safe clause constitute an express promissory warranty in the nature of a condition precedent, and that a strict compliance with it was necessary. Quoting 1st Wood on Fire Insurance, page 448."

In 18th Insurance Law Journal, page 813, the court held:

"A clause in a policy of fire insurance that the commercial books of the assured shall be kept in an iron safe at night is a promissory warranty, and a failure to comply with it will avoid the policy. A partial compliance by putting some of the books in an iron safe is insufficient. Where the assured fails to comply with this condition and his books are destroyed by fire, so that the amount of his loss cannot be proved by his books, he can make proof in no manner. It is incompetent for the court to determine whether or not the promissory warranty is material or immaterial; it suffices that the parties have made the agreement, and they must be held strictly to it."

We insist that it can make no difference what may have been the intention of the insured in removing these books from the safe at night. Their agreement was to keep them in a fire-proof safe at night, or some other secure place for the purpose of producing them, and they warranted to do this. The fact is, and they admit it, that they did not keep these books in such a secure place that they could produce them. And it is just the same, as far as the purpose is concerned for which they desired these books, and for which they warranted to produce them,

whether they tried, with best intentions, in removing them from the safe, to preserve them; that was a matter they should have passed judgment on before—of whether the safe where they had the books at the time of the fire was a fire-proof safe or not. They did not produce these books. They did not keep them in a fire-proof safe or some other equally secure place, and they were therefore destroyed at night and after business hours. And why they were not kept as required by the policy is a matter that they must stand responsible for.

In 30 S. W. Rep., page 384, *American Fire Ins. Co. v. First National Bank*, in construing the iron-safe clause the court say:

"If the party referred to signed a part of the contract of insurance and was by its terms made a condition necessary to be complied with before recovery should be had, the court should have so instructed the jury."

Kelley-Goodfellow Shoe Co. v. Liability Ins. Co., 28 S. W. Rep. 1027, (Texas).

Again, the Supreme Court of Arkansas, in the case of *Western Ins. Co. v. Altheimer Bros.*, 25 S. W. Rep. 1069, (and the laws and decisions of Arkansas govern and control the Indian Territory,) says that—

"The stipulations of the iron-safe clause constitute an express promissory warranty and of the clause as to ownership an affirmative warranty. They were in the nature of conditions precedent to a recovery, and a strict compliance with their terms is necessary according to the intent and

understanding of the parties. (Wood Ins., §§ 179, 449; May Ins., §§ 156, 157; Ang. Ins., 140; Ellis Ins., p. 28; 1 Arn. Ins., 213; 3 Kent Com., [12th ed.,] p. 289; *Wood v. Ins. Co.*, 13 Conn. 533; 1 Wood Ins., p. 436.) It follows that the first instruction of the court which told the jury that 'if the plaintiffs have substantially complied with the terms of the policy, they should recover,' is erroneous."

The trial court in this case not only told the jury, by its instructions, that 'if they had substantially complied with the terms of the policy they were entitled to recover, but further said to the jury (page 77 of Record):

"They have produced a set of books, an explanation of which you have heard made by the plaintiffs, and which seem to be substantially in compliance with the terms of the policy upon that subject."

Thereby practically leaving nothing for the jury to do but to return a verdict for the plaintiffs, defendants in error.

Further, the United States Court of Appeals for the Indian Territory, at the bottom of page 101 and at the top of page 102, say, in their decree:

"This court is of the opinion that a strict compliance with the conditions of the iron-safe clause is not required; but if there is substantial compliance with these covenants, the assured will be entitled to recover. (*Brown v. Palatine Insurance Company*, 35 S. W. Rep. 1060.)"

The court relied upon the decision of the Supreme Court of Texas in *Brown v. Palatine Insurance Company*. And

yet we find, upon an examination of this case, that the question decided by the court was not decided in that case at all. The Supreme Court of Texas state, in that case:

"It is, however, unnecessary for us to discuss the question as to whether compliance must be strict or may be substantial; for in the case now before us the real question is, What did the parties intend to prescribe as the measure of duty on the part of the insured in keeping his set of books?"

We insist that in the case of *Brown v. Palatine Insurance Company*, Supreme Court of Texas, the iron-safe clause was not construed at all. They however affirm in that case the rule laid down in *Goddard v. Ins. Co.*, in 67 Texas, page 71, but expressly state that they did not decide, and that it was unnecessary to decide, whether a strict or a substantial compliance with the iron-safe clause should be given. We adopt the views of Justice SANBORN in his dissenting opinion, as follows:

SANBORN, Circuit Judge, dissenting: "Is opening a fire-proof safe in one's place of business in which a book is securely locked, and either taking the book and losing it, or leaving it in an open safe, so it is burned up by an approaching fire which destroys the building in which it is situated, the performance of an agreement to keep the book securely locked in a fire-proof safe or in some secure place, not exposed to a fire which would destroy the one where such business is carried on? The opinion of the majority answer this question in the affirmative. I have been unable to resist the conclusion that it should be answered in the negative. The book certainly was not kept 'securely locked

in a safe,' nor was it kept 'in some secure place, not exposed to a fire which would destroy the house where such business is carried on.' On the other hand, the safe was unlocked, and the book was either lost or was actually exposed in the open safe or elsewhere to the fire which burned the house where the business was conducted, and was thereby destroyed. Is losing a book keeping it? Is exposing it to a fire by which it is destroyed, keeping it in some secure place not exposed to that fire?

"It is said that the insured had the option to keep the book securely locked in the safe or in some secure place not exposed to a fire which would destroy the business house, that this was a continuing option, and that they complied with their contract if they lost the book in transit in the night while they were attempting to exercise this option, and to take it from the safe to another secure place. But is this argument sound? The contract was that 'at night and at all times when the store mentioned in the within policy is not actually open for business' they would keep the book locked in the safe or in some secure place not exposed to a fire which would burn the building in which the safe was situated. It was that they would keep the book in one of two secure places during all of every night while the store was closed. It was not that they would keep it in one of those places or in transit between them. They undoubtedly had the right each day to choose in which place they would keep their book during the coming night, but, after the night had come and after the store was closed, if they took the book from the place which they had selected, and exposed it to the fire against which they had agreed to guard it, I see no escape from the conclusion that they violated their contract, because they no longer kept it in either of the secure places specified, and this, whether they removed it with the intention of transferring it from

one place to the other, or with some other purpose. They were not keeping it in either place while they were transferring it from one to the other. The contention of the majority here proves too much. If the insured could exercise their option once during the night, and after the store was closed, and expose the book to the danger of fire, they could exercise it many times, and could thus keep the book continually in transit and in neither of the safe places where they agreed to have it during the entire night. In my opinion, an agreement to keep an article in one of two specified secure places during certain hours of the night is not performed by losing it in transit between them during those hours.

"There is another proposition of the majority to which I cannot yield assent. It is, that an agreement to safely keep and to produce a book upon the trial of a lawsuit is not broken by a failure to keep and produce it, unless that failure is due to a wrongful or fraudulent act, or to the culpable negligence of the defaulter. The agreement of the insurer here was as clear and unambiguous as the English language could make it. It was that they would keep the inventory securely locked in the safe or in the other secure place specified each night, that they would produce it in case of a loss under the policy, and that, if they failed to do so, no action upon the policy should be maintained. They failed to keep it in either of the places named in the agreement, and they failed to produce it. It is said, however, that they never meant to agree to keep it or produce it; that they only intended to contract that they would not by any wrongful or fraudulent act or by any culpable negligence of theirs fail to keep and produce the book, that the contract should be construed according to this latter intention, and that, as the insurance company failed to prove any such fraudulent act or culpable

negligence of the insured there was no evidence of a breach of the agreement, although the defendants in error utterly failed to do the acts which by the plain terms of the written contract they agreed to perform. But there is no evidence of the intention of the parties to this contract except the policy itself. The policy contains no agreement that the defendants in error will not be guilty of fraudulent or wrongful acts or of culpable negligence in their care of the book. It nowhere mentions these terms or makes any reference to the subjects which they suggest. It is only a bald, plain contract to keep the book in one of the places specified, and to produce it. The terms of this agreement seem to me too plain for construction. In my opinion, they bring these cases under the familiar rules that 'where the parties have deliberately put their engagements into writing in such terms as to import a legal obligation without any uncertainty as to the object or extent of such an engagement, it is conclusively presumed that the whole engagement of the parties, and the manner and extent of their undertaking was reduced to writing.' (*Thompson v. Libby*, 34 Minn. 374, 377; *Barnes v. U. P. Ry. Co.*, 54 Fed. 87; 4 C. C. A. 199; 12 U. S. App. 17; *Wilson v. U. S. Cattle Ranch Co.*, 73 Fed. 994; 20 C. C. A. 244; 36 U. S. App. 634, 643,) and that, 'contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.' (*Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 463; *Fred J. Kiesel v. Sun Ins. Office of London*, 88 Fed. 246.)

"Under these rules I am unable to find anything in this contract to indicate that the parties to it intended to make any other agreement than that which it so clearly expressed.

Would it be any defense to an action upon an absolute promise to pay a debt that the debtor only intended to agree that he would not be guilty of any fraudulent act or culpable negligence which would prevent him from paying it and that he had not been? Would it be the province of the court, in the absence of other evidence, to construe a contract to build a house, to dig a well, to sell a horse, or to do any other act, into an agreement not to commit any fraudulent act or culpable negligence which would prevent the performance of the contract? The rule that courts may not make new contracts for parties which they never considered, and to which their minds never assented, answers these questions. The same rule seems to me to apply to an unconditional agreement to keep in a specified place and to produce a book. I can find in such a contract no evidence that the parties to it intended to make any other agreement. I am unable to see in it any proof that they intended that the insured should not agree to keep and produce the book, but that they should merely contract not to commit any fraudulent act or culpable negligence that would prevent them from keeping and producing it. The latter contract seems to me to be in the teeth of the former. It destroys the written agreement, and I cannot persuade myself, in the face of its plain terms, that the minds of these parties ever met on a contract to so effectually abrogate it.

"If this is the correct view of the meaning of this contract, it is immaterial whether its breach was caused by mistake, carelessness, from culpable negligence, or by an honest purpose to violate the agreement. By the terms of the agreement, the insured voluntarily took upon themselves the chances of the effects of their own imprudence, carelessness, purpose and performance. The record conclusively shows that their failure to perform their con-

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tract was not caused by any act of God, or the public enemy, or by the interposition of any force which made it impossible for them to fulfill it. The breach is therefore without legal excuse, and its inevitable consequence follows. The agreement was that no action should be maintained upon the policies if the book was not kept and produced. It is conceded on all hands that it was not kept and that it was not produced, and in my opinion, the insured were estopped by their agreement and by this fact from maintaining any action upon the policy. This view of the meaning and effect of the 'iron-safe clause' of policies of insurance is sustained by the following authorities. They hold that it is 'an express promissory warranty in the nature of a condition precedent,' and that a strict compliance with its terms is indispensable to a recovery upon a policy which contains it. *Western Assurance Co. v. Altheimer*, 58 Ark. 565, 575; *Southern Ins. Co. v. Parker*, 61 Ark. 207, 215; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 27 S. W. (Texas) 1027, 1031; *American Fire Ins. Co. v. First Nat. Bank*, 30 S. W. (Texas) 384, 385; Ostrander on Insurance, sec. 238; and *Landmann v. Hartford Fire Ins. Co.*, 18 Insurance Law Journal (La.), 813, 815, in which the court pertinently said: 'In this case there is no room for interpretation or construction; the language used in expressing the clause is free from ambiguity. It is printed in large type, annexed to the face of and is clearly a part of the policy. Its purpose was to enable the company, in case of loss, to procure satisfactory evidence of the extent of the loss, to protect it against unfounded augmentation of the value of the property destroyed and to enable it to obtain other evidence than that of the assured and his employees, however honest and correct they may be, of the damage sustained. Its purpose was, also, to enable the assured to make his loss

mathematically certain, and protect him against unfounded deductions. It was the plain intention of the parties that in case of loss, the books were to be the basis of the adjustment, and to enable them to be produced it was made a part of the policy that they should be kept in an iron safe.

" 'This the assured promised to do. The iron-safe clause in the policy is a promissory warranty. Being a warranty, a part of the contract, it is in the nature of a condition precedent to a right of recovery, and the parties whose rights are dependent upon such a condition must show they have performed it. "Agreements legally entered into have the effect of laws on those who have formed them." (R. C. C., art. 1901.)

" 'The court cannot add to or detract from the law they have made for themselves, or say that the promissory warranty shall not be enforced because it is not material. It is enough that the parties agreed to it, however foolish, improvident, or immaterial it may be.' "

We ask the court to consider the first, third, sixth, eighth and ninth assignments of error, together with the exceptions embraced in these assignments relating to the admissibility of the testimony of the plaintiffs, showing that some time before the fire they caused to be made an inventory of their stock of goods, and that on the night of the fire Mr. Kearney went to the safe and removed therefrom the small book containing the last inventory of the merchandise, together with other books, but that the book containing the inventory was lost and probably destroyed by fire, and that the inventory showed that the goods destroyed were of the value of about $9,000. By

the introduction of this testimony the provisions of the iron-safe clause in the policy were practically annulled. Plaintiffs were relieved of all obligation on their part to comply with the policy, although the policy sued on bound the plaintiffs, as a condition precedent to a recovery, to keep a set of books showing a complete record of the business transactions, together with the last inventory of their business; and further covenanted and agreed to keep such books and inventory in a securely locked iron safe at night; and in case of loss, the assured covenanted and agreed to produce such books and inventory; and in the event of their failure to produce the same, the policy sued on should be deemed null and void, and no suit or action at law should be maintained thereon for any such loss.

No effort was made to produce lost inventory.

In the case of *Imperial Ins. Co. v. Coos*, 151 U. S. 452, the United States Supreme Court say:

"It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been attempted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts cannot make a contract for the parties. Their duty or function consists simply in enforcing and carrying out the one actually made."

The contract actually made in this case was that Kearney & Wyse should produce the last inventory of their

stock in case of loss. It was rank carelessness and misjudgment on the part of Mr. Kearney to undertake to remove his books from the iron safe where he had agreed to keep them after his building was on fire. The question of his intention or good faith in his effort to remove them does not relieve him from his failure to comply with the agreement. A false fire alarm might have been sounded on the night before, or a week before, or a month before his stock was destroyed, and fearing that the fire would destroy his stock, he might have undertaken to remove his books from the safe and lost the inventory. His failure to produce it in that case would be the same as in this case. He has totally failed to produce any inventory. It is not a question of partial or substantial compliance with this important condition in the policy.

In Ostrander on Insurance, second edition, pp. 655 and 656, quoting from a Louisiana case, where it appeared that on the night of the fire, the plaintiff's son and clerk were at work on the books before the fire occurred, about 12 o'clock at night, and went to bed without putting the books on which they had been working in the iron safe as required by the insurance policy sued on, it is said:

"In this case there is no room for interpretation or construction. The language used in expressing the clause is free from any ambiguity. It is printed in large type, annexed to the face of, and is clearly a part of the policy. Its purpose was to enable the company, in case of loss, to procure satisfactory evidence of the extent of the loss, to

protect it against unfounded augmentations of the value of the property destroyed, and to enable it to obtain other evidence than that of the assured and his employees, however honest and correct they may be, of the damage sustained. Its purpose was also to enable the assured to make his loss mathematically certain, and protect him against unfounded deductions. It was the plain intention of the parties that, in case of loss, the books were to be the basis of adjustment, and, to enable them to be produced, it was made a part of the policy that they should be kept in an iron safe. This the assured promised to do. The iron-safe clause in a policy is a promissory warranty. Being a warranty, a part of the contract, it is in the nature of a condition precedent to a right of recovery, and the party whose rights are dependent upon such a condition must show that he has performed it. 'Agreements legally entered into have the effect of laws on those who have formed them.' The court cannot add to or detract from the law they have made for themselves, or say that the promissory warranty shall not be enforced because it is not material. It is enough that the parties agreed to it. However foolish, improvident, or immaterial it may be, it must be substantially complied with.

"In this case the clause has been violated. It has not been substantially complied with. It is no compliance, in substance, by the assured, with his promise to place his books in his iron safe 364 days out of 365 days in the year, if the day on which the property was burned was the day in the year on which the books were not placed in the iron safe, nor is it in compliance, in substance, to place only the invoice-book, showing the purchases, and leave out the books showing the sales, both for cash and on credit, the daily transactions, and a copy of his last inventory of stock. The invoice-book was of no service

alone. . . . Nor is it a defense to say that the evidence of the loss is conclusive, and is supplied from other sources. The assured promised, in case of loss, his books showing his business should be subject to the inspection of the defendant, and the defendant relied upon the production of the books, to furnish them with the exact extent of loss. Plaintiff has failed to comply with his promise, failed to supply the evidence required in the policy, and he cannot now be permitted to prove his loss by other evidence, however conclusive."

II.

Among other things, the defendant set up as a defense in this action the failure of plaintiffs to comply with the "iron-safe clause" of the policy sued on, in which the plaintiffs covenanted and agreed to "keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and on credit." Before plaintiffs can recover, they must show, either that they complied with this provision of the policy, or that the defendant waived its right to have it complied with. No waiver is alleged in the complaint, nor relied upon in the trial court. In order to ascertain whether or not plaintiffs complied with this provision of the policy, so as to be entitled to recover, it is first necessary to determine what the plaintiffs were required to do.

In *Pelican Ins. Co. v. Wilkinson*, 53 Ark. 352, the "iron-safe clause" of the policy identical with the one in this case was construed, and the court there gave a clear ex-

planation of the meaning of the clause contained in the policy sued on, that the "assured covenants and agrees to keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and on credit." In that case, the Supreme Court of Arkansas among other things, said:

"While it may be that, being a country merchant, whose system of bookkeeping was known to the appellant, he was not required to keep a full set of commercial books, yet it was his duty to comply with the agreement contained in the policy. This the contract required as a condition upon the performance of which his right of recovery depended. (May on Ins., §§ 156, 184.) The books kept by appellee were not destroyed. He testified that he kept a credit- or sale-book, showing all credit sales; that he kept a cotton-book, showing all cash and goods paid for cotton; that he kept a cash account, showing all cash taken in, and copies of bills of purchase, showing all goods purchased; that his last inventory was taken on the 1st of April, 1888, and showed the value of the stock on hand to be $1,811; that he estimated that goods to the value of $1,874 were destroyed by fire. The books and papers were all exhibited to the jury, except some invoices which had been lost. Appellee testified that he kept a merchandise account and a cash account, which are copied in the bill of exceptions, and it appears that at the end of each month he entered the amount of purchase during the month, and that he kept a book in which he entered each day his cash sales, and that at the end of each month he entered the aggregate amount of cash received on his books. We give a specimen of the manner in which the books were kept: 'Page 202. Taylor, Duffee & Co., Memphis, Tenn., 1887, June goods, $855.01;

July goods, paid $435.96. . . . In the stock at the 1st of June, 1887, up to April 1st, 1888, page 203, W. Y. M. Wilkerson, 1887, to June, to money taken in, $40. July, to money taken in, $90. Paid Taylor, Duffee & Co., paid June $10, one bale of cotton that was lost in 1886, $42. September, to money taken in $40,' etc. It is impossible to obtain any correct or satisfactory idea of the amount of goods on hand and destroyed by fire from this mode of bookkeeping. For aught the books show, goods of the value of $400 may have been sold for $40, as the items are not given, but only the aggregate amount of sales."

We think the plaintiffs in this case have utterly failed to show a compliance with the provisions of the clause of the policy in question as thus construed. They really kept no record of their business at all. We invite a careful consideration of the testimony of plaintiffs in this case. Mr. Kearney, in answer to questions put by Mr. Cruce, stated that his books showed a complete record of his business, including cash and credit sales. He also testified that the proof of loss which he had furnished the company contained a statement showing the amount of cash sales and credit sales, and the amount of purchases from the last inventory taken before the fire. But when he undertook to analyze his system of bookkeeping on the cross-examination, he showed affirmatively a failure to comply with the provisions of the policy. On the cross-examination, Mr. Kearney testified that the only book of original entry kept by his firm was what he calls a "day-book," and

that the cash-book and ledger were made up from entries taken from the day-book, and that they, together with what he calls his note-book, were all the books he kept.

Proceeding, he testified as follows:

Q. And now, that I may understand the facts about the matter, this day-book contained all the transactions of that store during the day's business? A. Yes, sir.

Q. From this, this ledger was taken and made up? A. And this other book here.

Q. You have the note-book you spoke of? A. Yes, sir.

Q. These are the books that constitute the memoranda or evidence of your business done in that store? A. Yes, sir.

Q. Now, does that day-book, which I hold before you, show the cash sales and the credit sales of the day? A. I don't think it did up to the time we burned.

Q. It didn't show the sales made during the day? A. It shows all the sales, but has to be taken up.

Q. How is that? A. It had to be taken from that.

Q. What did? A. The sales, the cash sales.

Q. You say this does not show the cash sales during the day of that business prior to the time of the fire? A. Why, yes, I think it does. The old cash-book is there to show.

Q. Does that day-book right here—does it show, Mr. Kearney, the individual cash sales made each day in that store prior to the fire? A. Separate from the other.

Q. What other? A. The credit sales.

Q. Does it show the individual cash sales? A. It shows all the business—yes.

Q. Does this day-book show the individual cash sales? I am talking of that particularly. Does it show the indi-

vidual cash sales made at your store during each day? A. We kept that book, and we got everything from it.

Q. You can answer me yes or no. Does that day-book show the individual cash sales of that store during each day? A. The way we kept it—yes, I think it would.

Q. I will ask you for that answer, please. A. That is all the books we kept, and all the way we kept them.

By Mr. Crnce: I think the books show whatever is the condition.

By the Court: I think it fair for counsel to examine with reference to whether it contains the entire record of the business.

Q. I will ask you if this day-book shows each individual cash sale of the goods of the day? A. It shows the sales of cash altogether.

Q. If a man came into your store to buy a hoe and it was $1.25, and it was on Tuesday—say John Doe came into your store on Tuesday and bought a hoe and paid $1.25 for it, would that go on the book? A. No, sir; it would go down in the cash drawer.

Q. Then the individual cash sales would not appear upon that book? A. That is not the way we kept it. We take it in and make up the cash from the drawer at night.

Q. Yet this is the only record you have or ever had of the cash sales made each day? A. Yes, sir.

Q. At night you would count the cash in the drawer, and then you would put in the day-book the collections of sales and the total amount as so much money? A. Yes, sir.

Q. That was the only record you ever had of the cash sales made each day or made at all? A. Yes, sir.

(Record, 20, 21, 22.)

Mr. Kearney also testified as to the purchases made by his firm, that his books only showed the totals of the bills of goods as they were purchased, and nowhere con-

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tained an itemized statement of the goods purchased by him. (Record, 20.)

He further testified that his firm kept no profit-and-loss account. (Record, 23.)

While Mr. Wyse, the other plaintiff, in the direct examination testified that his books showed the amount of cash and credit sales, yet, on the cross-examination, he shows a failure to comply with the clause of the policy in question even more clearly than is shown in the testimony of Mr. Kearney. After testifying that his firm kept no profit-and-loss account, that his book did not show the amount of goods in the warehouse separate from the amount of goods kept in the main building, and that from his books he could not tell the amount of goods in either building, he proceeds:

Q. This day-book you have here does not show anywhere the individual cash sales made during the day, does it? A. Not during the day—no, sir.

Q. And the only way you determined was at night to count the cash in the drawer, and at the bottom of the day's business the amount of cash was put down so much. Is that correct? A. That was our custom.

Q. That was the way it was done? A. Yes, sir.

Q. When the work of the day closed, did you simply count the money in the drawer and put down so much cash as representing your cash sales during the day? A. Sales and collections so much.

Q. Then the amount of money you would count in the drawer represented the amount of sales and collections for the day? A. Yes, sir.

Q. As a matter of fact, then, Mr. Wyse, you have no record of the exact amount of sales made each day, have you? A. Yes, the amount of sales shows on that book.

Q. If you should sell $20 worth of goods and a man should come in and pay you $70, your cash-book would show the amount of sales and collections, $90? A. Yes, sir.

Q. There would be nothing to show how much cash sales there were, and how much collections there were? A. Yes, sir.

Q. Sales and collections so much? A. Yes, sir. If you wanted to know them separately, just deduct the credit sales from the cash sales, and you would see how much there was.

Q. The only record kept was the sales and collections? A. The credit sales.

Q. When this book simply shows the credit sales made during the day, and then at night you put down this memorandum of cash and collections, so much in money? A. Yes, sir.

Q. If you wanted to know what the credit sales were, the book would show for itself? A. Yes, sir.

Q. How could you tell what the amount of cash sales were when the total amount in the drawer would be put down only? The total amount of money? A. If we wanted to know what the credit sales were, just refer to the day's business.

Q. I am not talking about the credit sales. You said the cash sales and collections so much? A. Yes, sir.

Q. If the cash sales were $20 and the collections were $70, then the item on the book would be, cash sales and collections, $90? A. Yes, sir.

Q. Then would you have any evidence to show what were the cash sales and what were the collections? A. If

we wanted to determine it, I would turn to the bills receivable.

Q. Would this book show how much cash sales were made that day, and how much collections, this day-book you keep? A. Yes, sir, it would show.

Q. Will you find it for me? This day cash sales and collections $79.25. Tell me how much cash sales? A. I would have to refer to this book to see what the cash and collections were.

Q. Does it show what the cash sales were aside from the collections? Can you tell from that book what the amount of cash sales were on any particular day? A. Yes, sir.

Q. Tell me what the sales were on this day, $79.20 call it. A. It says cash and collections.

Q. Did n't you say a moment ago that you could not tell from that book itself the amount, that you would refer to some other book? A. The cash-book; if there was any error, we would catch up with it on the cash-book. If there were any credit sales, they show on there.

Q. We are not talking about credit sales, Mr. Wyse; we are going to get that point out [hands witness book]. Now, there is an item, Mr. Wyse, of cash collections and sales. Will you tell me from that book what the sales were on that day? A. I can get mighty close to it if you will give me a pencil so I can figure it out.

Q. Can you tell from that book what the cash sales were on that day?

[Witness has pencil and figures.]

Mr. Quinton: I submit that it should be answered.

By the Court: If he can figure it out and tell it—

A. I think I can do so.

Mr. Quinton: This bookkeeping is guaranteed and covenanted to be in a certain way, and the question is, whether

the witness has kept the books in that certain way. A. I did not keep the books. I am not an expert bookkeeper. There may be some of these entries I don't understand exactly now.

Q. Now, Mr. Wyse, that I may be understood by the court and jury both, you state that this item here in this day-book, cash collections and sales, was put there from the amount of money you had in the cash drawer at night. Is that correct? Did n't you testify, and did n't Mr. Kearney testify, that you counted the cash in the drawer at night, and from the amount you had there you would make a memorandum on the book of collections and sales for that day, so much money. Is that true? A. Yes, sir.

Q. Now, that is the only place from which you did get that amount, is it not—the amount of money you had in the cash drawer? A. And entries through the day.

Q. Does that represent the amount of credit sales? A. No; there may be still credit sales in there; there may be sales and collections.

Q. There would not be credit sales and collections made that day? A. If there were any collections made on that day, they were counted in.

Q. And the cash sales were counted in there made that day? A. Yes, sir.

Q. Then the amount represents both the cash sales and collections and not the credit sales made on that day? A. Yes, sir.

Q. Can you tell me from that amount how much cash sales and how much collections on that day? A. I believe I can tell.

Q. I will ask you this question: Do you know from that item there how much the cash sales and collections were on that day? A. Yes, sir.

Q. Do you know from that entry how much was cash

sales and how much was collections? Do you know from that what the cash sales were for that day, from this $54.86? A. I think I do.

Q. Do you know from this entry, Mr. Wyse, cash sales and collections $64.85, from that entry, just how much was cash sales and how much was collections? Just look at that single entry. A. No, sir, I don't.

(Record, 30–33.)

Mr. Wyse also testified that he nowhere kept any books showing a complete statement, with the items, of the amount of his purchases. From the testimony of the plaintiffs, it appears that no effort was made to comply with the provisions of the policy requiring a record of all their business transactions to be kept. Their method of keeping an account of their business furnished the very opportunity for fraud which the defendant had endeavored to protect itself against in the policy. Suppose, for instance, $100 worth of goods had been sold on a given day for cash, and $75 of it had been put in the pocket of either Mr. Kearney or Mr. Wyse, or one of their clerks, instead of in the cash drawer, when they came to make the memoranda that night in what they call their day-book, no record would ever appear of the goods represented by the money pocketed.

This is true, not of one day alone, but of every day. They kept no record whatever of cash sales, and made no pretense that individual items sold through the day for cash were entered in any book; or that any book contain-

ing such entries was kept or produced to the insurance company.

Thousands and thousands of dollars' worth of goods were sold for cash without any record whatever being kept of it, except the amount found in the cash drawer at night, which would not show even the total amount of cash sales on any day, unless it so happened that on the particular day, no collections were made, and no money was paid out for current expenses. It would be miraculous if the money in the drawer at night would represent the cash sales on any day, and yet, *the amount of money in the drawer at night*, depleted every day by the amount paid out for current expenses, and augmented by the amount of collections, without any account being kept of either, furnished the only entries, which made up the record of the cash sales, kept by plaintiff. The requirement of the policy was wholly ignored. There is no conflict in the testimony on this subject, and the evidence does not present a question of partial or substantial compliance with the contract by which plaintiffs had obligated themselves to "keep a set of books showing a complete record of the business transacted, including all purchases and sales both for cash and on credit," but it shows a total disregard of that obligation, so far as their cash sales were concerned.

Defendant had contracted for better bookkeeping than is shown. It had contracted as a condition precedent to any liability that plaintiffs must keep and exhibit an item-

ized record of their cash sales. In *Pelican Insurance Company v. Wilkinson*, cited above, the Supreme Court of Arkansas, say: "For aught the books show, goods of the value of $400 may have been sold for $40, as the items are not given, but only the aggregate amount of the sales."

The items of cash sales were not kept by Kearney and Wyse, and the aggregate amount of sales was not kept, the *amount of money in the drawer at night* varying each day with the amount of collections and the amount paid out for expenses.

In Ostrander on Fire Insurance, 2d edition, 553, it is said:

"Should a record of the credit sales presented and the sales for cash omitted, the inventory and the record of purchases and credit sales will all be useless, for there is still a wanting in the chain of evidence, without which all the other facts can serve no important purpose. It is like a bridge across a stream with one section gone. We cannot pass."

With the invoices of the goods purchased and the last inventory of their stock destroyed, how was it possible for the plaintiffs to make from the books an accurate statement of the goods burned? There is not a syllable of testimony to show that the books of the plaintiffs contained a single item of the goods on hand in the store at the time of the fire. We ask the court's particular attention to this point. Only three, or at most four books, were kept by the plaintiffs—their day-book, cash-book, ledger, and

possibly a note-book which contained a list of notes taken from parties to whom they sold goods on a credit. It is not pretended in the testimony of either of the plaintiffs that they had any book which contained their invoices of goods purchased or an inventory of the articles in the store at the time of the fire. They claim that they had an inventory showing a list of the articles on hand in January preceding, but that this inventory was destroyed by fire. We repeat, how is it possible on such a showing for the plaintiffs to produce from the books an accurate account of the goods destroyed by the fire? Mr. Wyse, in his testimony, furnished the answer to this question. On page 34 the following occurs in the cross-examination of Mr. Wyse:

Q. Have you got any books or records showing the amount of what your last inventory was? A. No books.

Q. Then from what do you get the statement of what the amount of your last inventory was in January, 1894? A. We have got the books but not the inventory.

Q. Have you got the books? Have you got any books showing the amount of what your last inventory was in January, 1894? A. No books.

Q. How can you make a statement of that amount of that inventory? A. We sent to R. G. Dun & Co., and it was taken from our invoice they had.

Q. Are you testifying to the amount of the inventory of January 1, 1894, from the report of R. G. Dun—what they had down; what you had reported to them? A. Yes, sir.

RE-DIRECT EXAMINATION.

Q. I believe you stated you made the statement to R. G. Dun taken from this inventory. Is that correct? A. Yes, sir.

Q. Since the fire you have sent to R. G. Dun and got a copy of it? A. Yes, sir.

We tried to get rid of this testimony—moved to strike it out; and our eleventh assignment of error is founded upon the refusal of the court to exclude from the jury this testimony.

It thus appears that the proofs of loss were not procured from the contents of the books, or of the record kept of the business of Kearney & Wyse, but from a copy of the old inventory which they had sent, fourteen months before, to R. G. Dun & Co.

If the books of the plaintiffs contained a record of their business as required in the policy, why send to R. G. Dun & Co. for the invoice furnished them so long before the fire? This testimony shows that the contention of the plaintiffs that they have complied with the policy is utterly unfounded. They were permitted to recover in this case in total disregard of the provisions of the policy. This testimony also shows that the proof of loss as contained in the record is a genuine piece of guesswork. Having kept no account of the items of daily sales, how could the plaintiffs in this case, from an invoice made fourteen months before the fire, produce an accurate statement of the goods lost? The proof of loss so far as it purports to

have been made from the books or the records kept by the plaintiffs of their business is a fabrication pure and simple. It is in line with the testimony of the plaintiffs in this case on their direct examination, when they stated that their books showed a complete record of their cash and credit sales.

In the Court of Appeals for the Indian Territory, defendants in error insisted that it did not appear that the record contained all the evidence; but we insist that the record in this case contains all the evidence, and that this appears from the bill of exceptions. It is shown by the record that the testimony was taken down by the official stenographer and afterwards transcribed by him. The bill of exceptions purports to contain all the questions and answers of the witnesses. On the first page of the bill of exceptions the following recital occurs: "And the plaintiff, to make issues on his part, introduced the following witnesses, who testified as follows." The direct and cross-examination and the redirect examination of every witness purports to be given in full. At the conclusion of the examination of the witnesses, page 44, the following announcements were made: "Plaintiff rests;" "Defendant rests." All the papers referred to in the testimony of the witnesses are shown in the record as a part of the bill of exceptions. Upon such a record we think the court should presume that it contains all the evidence.

The correct rule is announced in the case of *Liggett v. Grinnett*, 36 Ark. 496, as follows:

"It is not expressly stated in the bill of exceptions that it contains all the evidence introduced at the trial, but such is to be inferred from its general tenor. It sets out the evidence that was introduced by the parties, and that offered and excluded, whereupon the case was submitted."

In *Everett v. Clemens*, 9 Ark. 478, it is said:

"A bill of exceptions taken on the court's refusal to grant a new trial must necessarily show that it contains all the evidence introduced in the cause; but it is not necessary that it should avouch in express words that this is all the evidence in the case. It is sufficient if it appear from the language used that the whole evidence was given. The bill of exceptions here, after setting forth the evidence of two witnesses, says: 'Upon this evidence the parties submitted the case to the court.' This language certainly excludes all idea of any other evidence having been given, and clearly imports that it is all the evidence before the court on the trial."

Moss v. State, 17 Ark. 331.
Daniel v. Crosby, 19 Ark. 443.
Seriath v. State, 35 Ark. 412.
Thomas v. Hinkle, 35 Ark. 450.

III.

The second, seventh and tenth assignments of error relate to the exceptions taken on the trial to the admission of the testimony of plaintiffs to the effect that the proof of loss furnished by the plaintiffs showed the total amount of cash and credit sales and the amount of their

purchases since the last inventory was taken before the fire, and that the books kept by the plaintiffs showed the total amount of their cash and credit sales, and we ask the court to consider them together. Proofs of loss are not admissible to prove their contents.

IV.

The 15th and 16th assignments of error relate to the refusal of the court to charge the jury in the very language of the policy sued on, and to define the effect of the plaintiffs' refusal or failure to comply therewith. If the iron-safe clause of the policy sued on was valid and the plaintiffs were bound thereby, this charge should have been given. The refusal to give this charge amounted to a complete exemption of the plaintiffs from any obligation under this clause of the policy.

There are many other reasons that may be urged for a reversal of the case under the exceptions taken on the trial. We think we have shown that by the admission of the evidence objected to on the trial, the charge given by the court, and the requested charges refused, plaintiffs in this case have been permitted to recover upon a contract wholly different from the one contained in the policies, and that the trial court substituted an entirely different contract, which exempted the plaintiffs from the performance of the

conditions imposed upon them in the contracts sued on. The court exempted the plaintiffs from the obligation to keep the set of books as required in the policies, exempted them from presenting to the insurance company the inventory which the policies required them to present, and permitted them to recover, after a strenuous effort on the part of the defendant in the court below to enforce its contract against the plaintiffs. The plaintiffs in their complaint claimed no release or discharge of the obligations, and pleaded no waiver on the part of the defendant of any condition in the policies. In the opinion of the trial court, no claim of exemption from the obligations, nor waiver of the defendant's right to enforce them, were needed. The counsel for plaintiffs and the trial court seemed to proceed on the idea that the contract sued on was an exacting one which plaintiffs were unable to comply with, and a new one had to be substituted, and we respectfully submit that the substitution was complete, and a new contract, born during the trial of the case, was vigorously enforced against the defendant.

Respectfully submitted.

QUINTON & QUINTON,

Solicitors for Appellant.

E. S. QUINTON,

Of Counsel.

10643

No. 85.

Brief of Cruce v Cruce

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

Filed Nov. 24, 1900.

SUPREME COURT OF THE UNITED STATES.

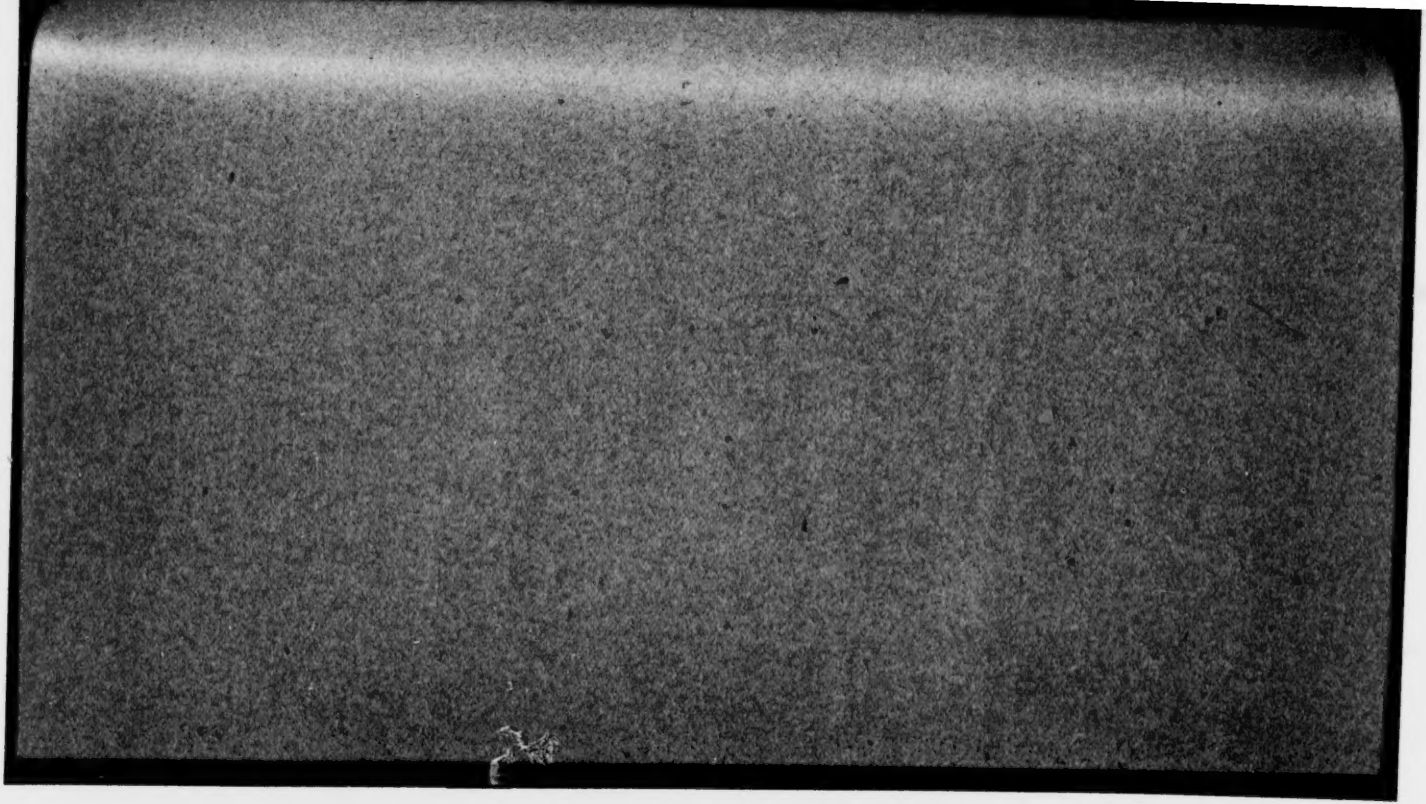
THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY,
PLAINTIFF IN ERROR.
vs.
T. K. KEARNEY AND J. W. WYSE,
Composing the partnership firm of Kearney & Wyse.
DEFENDANTS IN ERROR.
No. 85

BRIEF OF APPELLEES.

A. C. CRUCE,
Attorney for Appellees.

Associate Counsel:
W. I. CRUCE.

Judge-Cole Stone Job Print.



10646

SUPREME COURT OF THE UNITED STATES.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY,
PLAINTIFF IN ERROR.
vs.
T. K KEARNEY AND J. W. WYSE,
Composing the partnership firm of Kearney & Wyse,
DEFENDANTS IN ERROR
No. 85.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The Defendants in Error can not accept the statement of the Plaintiff in Error. The statement is incorrect in declaring "That it was admitted on the trial that the plaintiffs below had no inventory and that they did not keep a complete set of books."

We adopt the following statement of Judge Thayer, who delivered the opinion of the Court in this case in the Eighth Circuit Court of Appeals, sitting at St. Louis:

"Concerning the facts of the case there is practically no dispute. On the night of April 18, 1895, between the hours of one and three a. m., a fire accidentally broke out in a livery stable in the town of Ardmore, which was about three hundred yards distant from the plaintiffs' place of business. Efforts to arrest the progress of the conflagration failed, and when it approached so near the plaintiffs' place of business that the windows of their store were cracking from the heat, and the building was about to take fire, one of the plaintiffs entered the building for the purpose of removing the books of the firm to a safer place, thinking it would be better to remove them than to take the chances of their being destroyed by fire He opened an iron safe in the store in which they had been deposited for the night, which was called a fire proof safe, and took them therefrom and to his residence, some distance away. The books consisted of a ledger, a cash book, a day book or blotter, and a small paper covered book containing an inventory, that the firm had taken of their stock, about January 1, 1895. In the hurry and confusion incident to the removal of the books, the inventory was either left in the safe and was destroyed, or was otherwise lost, and could not be produced after the fire. The other books, however, were saved, and were exhibited to the insurer after the fire and were subsequently produced as exhibits on the trial. There was neither plea nor proof that the loss of

the inventory was due to fraud or bad faith on the part of the plaintiffs, or either of them."

II. The statement of the Plaintiff in Error wholly omits the circumstances connected with the signing of the bill of exceptions. This case was tried on the 23d day of September, 1895, and the bill of exceptions was settled on the 5th day of December, 1896. (R. 70). The facts connected with the signing of the bill of exceptions, are briefly stated by Judge Springer, Chief Justice of the Court of Appeals for the Indian Territory, in the opinion rendered in this case on the 25th day of June, 1898:

"The case was tried in the court below on the 23rd day of September, 1895. Motion for new trial was overruled and sixty days' time was allowed within which to prepare and file bill of exceptions. By two separate agreements, signed by attorneys for both parties, the time for preparing and signing the bill of exceptions was extended until the 19th day of January, 1896. On December 28, 1895, the attorney for the appellant received the bill of exceptions from the court stenographer. On January, 13, 1896, the attorney for the appellant appeared at Ardmore to present his bill of exceptions to Judge Kilgore, but he was not there at that time, being in attendance upon the United States Court of Appeals for the Indian Territory, at South McAlester. The attorney started immediately for South McAlester, and, on arriving there, learned that Judge Kilgore had, on the day before his arrival, departed for the city of

Washington, where he was called upon public business. The attorney thereupon sent the bill of exceptions by express to Judge Kilgore at Washington, where the same was received on January 18, the day before the time for signing the same had expired. Judge Kilgore declined to sign the bill of exceptions upon the ground that it did not contain a true record of the case, and for the further reason that it had never been presented to the attorneys for the appellees. An application was made to the United States Court of Appeals for the Indian Territory for a writ of mandamus to compel Judge Kilgore to sign the bill of exceptions. The Court refused to grant the writ of mandamus for the reason that Judge Kilgore, in his response to said writ, stated that at the time the bill of exceptions was presented to him, he had no means of examining the official report for the purpose of correcting the bill of exceptions, and he refused to sign the purported bill of exceptions presented to him for the reason that it was incorrect. He further stated that no other different bill of exceptions was ever presented to him for his signature, and further that he was willing to sign a correct bill of exceptions in the case, and would have signed the same had a correct one been presented to him within the time fixed by the Court, but that in his judgment he had lost jurisdiction of the matter after the 18th day of January, 1896."

By reference to the response of Judge Kilgore to the alternative writ of mandamus (R. 82 to 84) it will be seen that the official stenographer furnished

the attorneys for the defendant below a correct transcript of the proceedings had upon the trial of this cause, twenty-five days before the expiration of the time granted to defendant below in which to file its bill of exceptions. That defendants "eliminated from the transcript furnished by the stenographer portions of the record which show the charges of the trial court, and the exceptions thereto, and inserted in lieu thereof eleven typewritten pages which contained other and different things from what occurred in the trial of the cause, and which was in no wise a correct and accurate bill of exceptions.

ARGUMENT.

Will the Court consider the bill of exceptions in this case? The case was tried on the 23rd day of September, 1895, and what purports to be a bill of exceptions was signed by the judge on the 5th day of December, 1896. Two terms of Court had intervened, towit.: the February and September terms. Sec. 5157 of Mansfield's Digest (Ark.) which is the law in the Indian Territory, provides, "That a party objecting to a decision must except at the time the decision is made, and time may be given to reduce the exception to writing, but not beyond the succeeding term." This statute is construed in Carroll vs. Saunders. 38 Ark., 217: "Time cannot be given beyond the next succeeding term to that at which exceptions were taken, in which to prepare and tender

a bill of exceptions, and a bill of exceptions signed by the judge after the term at which they were taken, where time has not been given, or after the next term thereafter, *though such time were given, is a nullity.*"

By virtue of two agreements signed by appellees' counsel, the trial judge reserved the power to settle the bill of exceptions at any time prior to and including the 19th day of January, 1896. After that date its power to settle the bill of exceptions was gone.

It is true that the bill of exceptions was tendered to the trial court on the 18th day of January, 1896, in the city of Washington. He refused to sign the bill, however, giving as his reason that he had no opportunity to consult the official stenographer's report for the purpose of correcting it; that a correct record had been prepared by the stenographer and furnished the appellant, but that appellant had purposely changed the record so as to make it speak an untruth. (Rec. p. 83). This record had been furnished to the appellant on the 24th day of December, 1895, and we submit that it was appellant's fault, and not the fault of the trial judge, that a proper bill of exceptions was not signed within the time reserved by the agreements heretofore referred to.

Should the Court, however, entertain the bill of exceptions, we submit there is no proper exception, either to the Court's charge, or to the refusal of the Court to give the instructions requested by

the defendant. The record (pp. 64-5) shows that at the conclusion of the Court's charge "The counsel for defendant arose and stated: 'I desire to except to the instructions asked by the attorney for the plaintiffs; and also to some portions of your honor's charge. There are some parts of the charge I do not desire to except to.'" Whereupon the Court remarked: Very well, sir; you will be permitted to take your exceptions.

"And afterwards, to-wit, on the 13th day of January, 1896, the defendant prepared his exceptions to said charge, as it contends, in accordance with the permission above given, and herewith presents the same as follows, and asks that they may be made a part of the record in this case and allowed as exceptions. The court refused to allow said exceptions, but permitted the same to be printed in the record for the purpose of enabling the Court of Appeals to determine whether said exceptions are properly taken. The charge, with the exceptions thereto *tendered* by the defendant, is as follows." Then follows in the record the Court's charge, with specific objections thereto. The defendant contended that it had the right to specialize the exceptions four months after the trial of the cause. It is not deemed necessary to cite authorities to show that this general exception is tantamount to no exception at all.

II.

The appellant is correct in stating that, "The real question in this case is raised by the state-

ments and instructions of the trial court under the assignments of error 12, 13, 14, 15, which is, whether the iron safe clause of the policies of insurance sued on in this action, is a promissory warranty and must be *strictly* complied with. By the terms of the policies, appellees bound themselves to keep a set of books showing a complete record of their business, as well as an inventory, securely locked in a fireproof safe at night, and at all times when the store mentioned was not actually open for business, or in some other secure place, not exposed to a fire which would destroy the business house; and in the event of loss to produce such books and inventory. The testimony is overwhelming in this case, that the appellees did keep a set of books, showing a complete record of their business, together with the inventory, and that all of such books were, on the night of the fire, securely locked in a fireproof safe in their building. In their efforts to remove the books from the safe during the fire the inventory was inadvertently lost, and for that reason the appellees were unable to produce it. Does this bar their right to recover?

If the terms of the iron safe clause, which required that the appellees should produce the inventory after the fire, must be literally complied with, then it is confessed that appellees cannot recover. We submit, however, that such construction cannot be given the terms of the policy.

A sufficient number of Courts have construed this provision of insurance policies to indicate

clearly what the law is. Before referring to these authorities, however, it may be well to suggest that the rules governing other contracts are applied in the construction of insurance contracts:

"It may be well to observe here, because there are unconsidered suggestions to the contrary, that the principles of interpretation applicable to contracts of insurance are the same as those which obtain in the case of other contracts. * * * * * * * * When it is said that a contract of insurance is a contract *uberrimæ fidei*, this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract in which one of the parties is necessarily less acquainted with the details of the subject of the contract than the other. Its language, says Nelson, C. J., 'is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a *strict literal* compliance with its terms than in ordinary contracts. Full legal effect should always be given to it for the purpose of guarding the company against fraud and imposture. Beyond this, we would be sacrificing substance to form—following words rather than ideas.' Indeed, a moment's reflection will render it apparent that there is nothing in an agreement about insurance intrinsically more sacred or inviolable than in an agreement about any other subject matter. It differs only from others in the fact that, from the nature of the contract of insurance and the rela-

tions of the parties, occasions therein more frequently arise where the rights of the respective parties depend upon the exercise of good faith. And while the older cases had oftener to deal with the want of good faith on the part of the insured, the modern ones are full of examples where the Courts have been compelled to a liberal application of the doctrines of waiver and estoppel to protect the insured against defenses founded on a want of good faith on the part of the insurer" (May on Insurance, 3rd Ed., Sec. 172).

"The designation 'iron safe' is not construed to mean an iron receptacle for books and papers that will be an absolute protection against fire. The words are not used in their literal, but in the popular and ordinary sense. The merchant who warrants to keep his books securely locked during the night time in such a safe will need, in showing performance, to do no more than establsh the fact that his records were contained in an iron safe of such character as are in common use by other merchants and business men for the same purpose. Whether or not the warranty has been performed will be a question for the jury.

"Substantial compliance with the 'iron safe' clause requires the keeping of a suitable safe, such a one as will afford reasonable protection under such circumstaaces as each particular case presents. What would be necessary in an ordinary dwelling or small country store would often be wholly insufficient in a manufacturing establishment, where the safe would be exposed to great intensity of

heat in case of a conflagration. *Ordinary judgment and good faith are demanded of the insured, and when this is shown he may be excused from literal performance.*" (Ostrander on Fire Ins., Sec. 303).

In Jones, et al , vs. Southern Insurance Company, 38 Fed. Rep. 19, Judge Caldwell holds that a literal compliance with the terms of the "iron safe" clause is not necessary. In that case the policy contained the "iron safe" clause in the exact terms of the policy in this record. The fire occurred at nine o'clock at night. The insured had a fireproof safe in their store, in which they kept their merchandise books when not in use. The clerk had closed the doors of the store and was posting up the books preparatory to putting them in the safe. He left the store, however, at the invitation of a friend to take lunch, and while gone the store, together with the books, was destroyed by fire, the books having been left open on the counter. A literal construction of the terms of the "iron safe" clause would have defeated plaintiffs' right to recover. The fire occurred at night, when the books were neither in the iron safe, nor any other safe place, so far removed from the place of business as that a fire destroying it would not destroy the books; neither were the plaintiffs able to produce any of the books after the fire. They were, however, permitted to recover.

In Western Assurance Co. vs. Redding, 68 Fed. Rep., 708, the Circuit Court of Appeals for the Fifth Circuit, speaking through Judge McCor-

mick, holds that a strict compliance with the terms of the "iron safe" clause is not required. In that case, the facts were, that the store was burned between two and three o'clock in the night, and not during business hours, and when the store was closed. The insured kept an inventory and a set of books, showing a record of his business. Assured had a cash book in which he made daily entries of cash sales, which was inadvertently left out of the safe, the night of the fire, and was destroyed. Being unable to produce this book after the fire, the insurance company contended that no recovery could be had—that a strict compliance with the terms of the policy was required. The Court disposed of this contention in the following language:

"The policies in common use are travesties on the common sense form in use in marine insurance. And while the distinctions and constructions announced in Pawson vs. Watson, Cowp. 785, and in De Hahn vs. Hartley, supra, are too well settled to be disturbed by judicial action, there has long been a marked and growing judicial sense that the application of these, and later cases in line with them, should not be carried beyond the boundaries of controlling precedents, that common honesty and common sense are safe guides in the construction of even these wonderfully devised contracts. While, therefore, it is certainly the law that a precedent condition warranted to exist must in fact exist, exactly as stated, or there will be no contract, because the minds meet only on all

the stipulated conditions, a promissory warranty is often, if not always, necessarily a condition subsequent, and courts should, and do, and will, apply to these the doctrines that obtain in adjudging forfeitures. It would too greatly extend this opinion to review the cases. Many of them are cited and epitomized in the third edition of May on Insurance, in the chapters on Warranties, Representations and Exceptions. We think the application to the case at bar of what we have here advanced is apparent. The judgment of the Circuit Court is affirmed."

The case of East Texas Fire Insurance Company vs. Harris, 25 S. W. Rep., 720 (Texas) was a suit upon a policy containing a clause in the exact terms of the "iron safe" clause in the policy sued on in this case. The facts were: "The plaintiff kept all the books required by said clause of the policy, showing all the facts thereby required, in a fireproof safe, as required, in the store house where he did business, and where the property was burned. Said books were locked up in a safe at the time of the fire in question; but Mr. Harris (appellee's clerk and bookkeeper) fearing that the safe would not be able to withstand the fire, and that the books would be destroyed, if left in the safe while the fire was in progress, opened the safe, and took therefrom said books and inventory, and other papers belonging to the plaintiff, intending to remove them to a place of safety; and, while so doing, persons outside of the building called to him to come out, as the walls

were falling. When so called, he had said books, papers and inventory in his arms, and, as he ran out of the burning building, some of them fell from his arms, and were destroyed by the fire. The documents and books so destroyed included the plaintiff's last inventory of stock, and the merchandise account, showing the goods purchased by plaintiff, and his cotton book and cotton calcution." In that case the insurance company contended that the warranty in the iron safe clause had been broken. The Court said:

"If it be conceded that the clause referred to constitutes a warranty, we do not think the facts show, as contended by the appellant, that it was broken. It did not require appellee, absolutely and unconditionally, to keep his books in a fireproof safe. It required him to keep them in such a safe, or in some secure place, not exposed to a fire that would destroy the house where the business was carried on. Having the alternative right to keep them in a place of safety, other than in a safe, he also had the right to take them from the safe, and remove them to such other place; and if he exercised due care in so doing, and they were lost, there is no breach of warranty. The trial court filed no conclusions of law, but we presume it held that the attempted removal of the books at the time of the fire was not negligence, and we are not prepared to say that such holding was wrong. Although a literal reading of the policy would apparently justify such a construction, we do not think that it was intended by the parties

that the mere failure to produce the books and inventory, although kept in the manner and at a place required, should forfeit all appellee's rights under said policy. For instance, if he had kept them securely locked in a fireproof safe, and, without fault on his part, burglars had blown open the safe, and stolen them, his failure to produce them at the trial would not have breached his warranty, if warranty it be."

Brown vs. Palatine Insurance Co., 35 S. W., 1060, is a case from the Supreme Court of Texas. The insured had bound himself by the same iron safe clause contained in the policy sued on in this action. A part of his books were left out of the safe on the night of the fire and were destroyed. Judge Brown, speaking for the Court, says: "In the construction of policies of insurance, the same rules of law will be applied as in the construction of contracts made between individuals under like conditions, and no greater strictness is required in the performance of the one than the other. It is often said that a warranty in a policy of insurance must be strictly complied with, and sometimes it is said that it must be literally fulfilled; but this is no more true of that character of contract than of others, and means no more than that when the language is clear it must be performed as expressed, which is equally true of all kinds of written undertakings. * * * * The subject to which this warranty relates is the keeping of a set of books in a mercantile business, in which the sales were to made and recorded by a

number of clerks, and, when so made, to be transferred by other employes. In other words, it was a business to be transacted for the insured by employes. It is a matter of common knowledge that absolute accuracy in such business is unattainable, and it would be, perhaps, an impossible thing to find a set of books, which would show the transaction of such business with the accuracy claimed by the insurance company. These things must have been in contemplation of the parties when the contract was made, and it will not be presumed that the parties intended to prescribe that which was practically impossible. A *substantial* performance of the contract would suffice in that case; that is, the contract is to be construed as including no more than could be reasonably expected of the insured."

The Kentucky Court of Appeals, in Phœnix Insurance Company, vs. Angel, 38 S. W., 1067, disposes of this question as follows:

"It is, however, admitted that the inventory and books were not kept in a fireproof safe, nor in any fireproof place or apartment; but it is claimed that the agent at the time knew that the assured had no fireproof safe, nor anything of the kind, and waived that part of the policy; and, if that be true, then the failure of the assured in that regard cannot defeat a recovery in this case. But we are of the opinion that a failure to comply with such a provision, although in the policy, would not work a forfeiture thereof. It is without consideration. It does not decrease the risk, and at most

would only tend to the better preservation of the evidence to show the amount of the loss sustained in the case of fire. It does not seem to us that it is competent to contract with the assured for the preservation of testimony in behalf of either party."

This doctrine was re-affirmed by the Kentucky Court in Mechanics & Traders' Insurance Company vs. Floyd, 49 S. W. 543, and in Citizens' Insurance Co. vs. Crist, 56 S. W. 658.

The case of McNutt vs. Virginia Fire Insurance Co., 45 S. W. 61, (Tenn.) holds that a *substantial* compliance with the requirements of the iron safe clause is all that is necessary. It is there held as to the iron safe provision, "The rule of construction should be honesty, good faith, and good common sense."

The Georgia Court, in the case of the Liverpool and London and Globe Insurance Co. vs. Ellington, 21 S. E. Rep., 1006, lays down the same doctrine.

The Alabama Court, in the case of Georgia Home Insurance Co. vs. Allen, 24 Southern Rep., 399, sustains the same common sense rule.

The Alabama Court quotes with approval Section 2063, 3 Joyce on Insurance, which is as follows: "In a federal case it is held, a *substantial* compliance is sufficient under the 'iron safe clause,' requiring a set of books and an inventory to be securely locked in a fireproof safe at night, and at all times when the store is not actually open for business, or in some secure place, and that in case of loss assured will produce said books and inven-

tory; such a clause is a condition subsequent only, and a literal, exact fulfillment is unnecessary. This decision certainly seems more in accord with the actual intent of the parties, and with the justice and reason of the law, and with the tendency of the decisions, than a construction requiring an exact and literal compliance."

To the same effect is Kemendo vs. Western Assurance Co., 57 S. W., 293 (Texas); Penn. Fire Insurance Co. vs. Brown, 36 S. W., 590 (Texas); Sun Mutual Insurance Co. vs. Brown, 36 S. W., 591 (Texas).

The Supreme Court of Arkansas, in the case of American Central Insnrance Co. vs. Ware, 46 S. W., 129, supports the same doctrine. The defense in this case was that the assured had failed to comply with the iron safe clause. "The adjuster for the defendant, after the fire, made some examination of the inventory, invoice and books kept by the plaintiffs. During the course of this examnation he discovered certain incorrect entries in the books kept by the plaintiffs prior to the issuance of the policy, and thereupon he abandoned the adjustment, and declined to make further examination." The defendart company now contends that the plaintiffs failed to produce all of their books to the adjuster. The plaintiffs admitted that they had failed to produce the memorandum book kept by the clerk, Moffit, but the evidence on their part tended to show that this was the result of inadvertence, and wholly unintentional. The evidence of the plaintiffs

tended to show that all the other books were produced to the adjuster, while on the part of the defendant there was evidence to show that a book called the "blotter" was not produced. "The Court told the jury that it was the duty of the plaintiffs to produce their inventory and books, but that if, through inadvertence or oversight, the plaintiffs failed to produce one or more of their books to the adjuster, this could not preclude a recovery. We see no error in this instruction."

Judge Sanborn, who rendered the dissenting opinion in the Circuit Court of Appeals in the case at bar, collated all the authorities which it is claimed sustain the doctrine that a literal compliance with the terms of the "iron safe" clause is indispensible to a recovery. The case of Kelley Goodfellow Shoe Co. vs. Liberty Insurance Company, 28 S. W. Rep., 1028, and American Fire Insurance Co. vs. First National Bank, 30 S. W. 384, both Texas cases, are cited as sustaining this doctrine. An examination of these cases, however, it is believed will disclose the fact that they do not sustain the contention of the learned judge. In these cases the question before the Court was whether the provisions of the "iron safe" clause constituted a *warranty*, or whether they were simply *representations*.. The Texas Civil Court of Appeals held that they were warranties and not representations. The question, however, as to whether the warranty should be literally complied with, or whether a substantial compliance was all that was necessary was not before the Court.

The case of Landman vs. Hartford Fire Insurance Co., 18 Insurance Journal, 813, quoted by Judge Sanborn, it is believed, likewise fails to sustain the contention of the appellant. In that case the plaintiff's son and his clerk left the store building about 12 o'clock at night, and failed to put the books in the iron safe, except the inventory, which had not been taken out of the safe. The fire occurred about two o'clock at night, and all the books, except the inventory, were destroyed. The Court held that the insured could not recover, using the following language: "The Court cannot add to or detract from the law they (the parties) have made for themselves, or say that the promissory warranty shall not be enforced because it is not material. It is enough that the parties agreed to it. . However foolish, improvident, or immaterial it may be, it must be *substantially* complied with. In this case the clause has been violated. It is no compliance, *in substance*, by the assured, with his promise, to place his books in his iron safe 364 days out of the 365 days in the year, if the day on which the property was burned was the day in the year on which the books were not placed in the safe, nor is it compliance, *in substance*, to place only the invoice book, showing the purchases, and leave out the book showing the sales, both for cash and on credit, the daily transactions, and a copy of his last inventory of stock."

It will be remembered, that in this case there is no contention of any act of bad faith or fraud on the part of the appellees. It is not denied in

the pleadings that their loss aggregated the sum of ten thousand dollars, which was only partially covered by insurance of thirty-five hundred dollars. It is admitted that the inventory and other books were all kept in a fireproof safe until the time the fire attacked their building. The testimony of one of the appellees is that he thought it safer to remove the books from the safe to some other place of safety. It is not contended that he was guilty of any carelessness or bad faith in attempting to do this. The terms of the policy gave him the alternative right to keep the books either in the safe or in some other place of safety. It would be an anomaly to say that he had the right to take his books out of the safe and move them to some other place of safety, and then to say that if while exercising this right, which he had under the terms of the policy, and without fault, he lost his book, he could not recover. No Court has ever held such a doctrine, and we are loath to believe that any Court will ever so hold.

Before leaving this branch of the case we desire to correct the erroneous statement in appellant's brief, "That the books left in the safe were not destroyed by the fire, even though the door was left open." There is absolutely nothing in the record to justify this statement. The only testimony upon this point is found on page 16 of the record, where the trial judge propounded the following questions to one of the plaintiffs:

Q. When did you first miss that book (inventory)—discover you had lost it? A. When the safe was OPENED, after the fire.

By the Court: Did you close the safe after taking the books out?

A. Just shut the door. I don't remember whether I bolted it or not.

III.

It is not deemed necessary to refer at length to appellant's contention that the books kept by the appellees were not such as were contracted for under the terms of the policy. Whether they were such a set of books as complied with the terms of the policy was a question for the jury to determine. The books, such as were kept, were introduced before the jury; and it is a significant fact that the appellant has not brought into the record a single page from one of these books.

It is impossible for this Court, with the testimony before it, to ascertain whether or not the books did contain a correct statement of appellees' business. Both of the plaintiffs testified that while no *one* book showed a complete record of their business, yet *all* of their books when taken *together* did show such a record.

The plaintiff, Kearney, on cross-examination, testified as follows (record, pp. 19-20):

Q. I will ask you to look at that book, Mr. Kearney, and state if it is not a ledger, kept in the way ledgers are kept, according to a system of bookkeeping?

A. Yes, sir.

Q. That book is a cash book (meaning the second book)?

A. Yes, sir.

Q. Is it not a fact that the ledger simply shows the total amount taken from the other books?

A. It shows the cash sales.

Q. When were these memoranda on this book made up, at the time of sale?

A. Yes, supposed to be, if we kept up with the books.

Q. When a sale was made for cash, in the order of business there, you put that on it?

A. No, sir; took it from the day book.

Q. This is not an original entry, then?

A. Taken from the day book.

Q. This cash book is not an original entry book?

A. No, sir.

Q. Now, what book is this (referring to third book)?

A. We used that for a day book.

Q. What does that book in a general way contain?

A. *Shows all the transactions of the day.*

Q. All the transactions of the day?

A. *Yes, sir.*

Q. This book then is the only one that shows the daily transactions?

A. That shows the entries, *everything on it.*

Q. The business of the day is contained in this book?

A. *Yes, sir.*

Q. From this book the cash book and the ledger are made up?

A. Yes, sir.

It was the province of the jury to determine whether or not this witness was telling the truth; and we again insist that if appellant desired to contradict the witness, it was its duty to introduce at least specimen pages of the book, so that this Court might determine whether the system of bookkeeping, adopted by the appellees, was such as was contracted for under the terms of the policy.

Respectfully submitted,

A. C. CRUCE,

Attorney for Appellees.

Associate Counsel:

W. I. CRUCE.

10658

Supreme Court of the United States.

No. 85.—October Term, 1900.

The Liverpool and London and Globe Insurance Company, Plaintiff in Error, *vs.* T. K. Kearney and J. W. Wyse, Partners as Kearney & Wyse. } In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 7th 1901.]

Mr. Justice Harlan delivered the opinion of the Court.

This action was brought to recover the amount alleged to be due on two policies of fire insurance issued by the Liverpool and London and Globe Insurance Company—one dated June 15th 1894 for $2,500 and the other dated February 11th 1895 for $1,000—each policy covering such losses as might be sustained by the insured, Kearney & Wyse, in consequence of the destruction by fire of their stock of hardware in the town of Ardmore, Indian Territory.

Each policy contained the following clause, called the iron-safe clause: "The assured under this policy hereby covenants and agrees to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and, in case of loss, the assured agrees and covenants to produce such books and inventory, and in the event of the failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

The insurance company insisted in its defense that the terms and conditions contained in this clause of the policies had not been kept and performed by the insured.

There was a verdict and judgment in favor of the plaintiffs in the United States Court for the Southern District of the Indian Territory, and that judgment was affirmed in the United States Court of Appeals for that Territory.

The insurance company sued out a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and that court affirmed the judgment. 94 *Fed. Rep.* 314.

The controlling facts are thus (and we think correctly) stated in the opinion of Judge Thayer, speaking for the court below: "On the night of April 18th 1895, between the hours of one and three A. M., a fire accidentally broke out in a livery stable in the town of Ardmore, which was about three hundred yards distant from the plaintiffs' place of business. Efforts to arrest the progress of the conflagration failed, and when it had approached so near to the plaintiffs' place of business that the windows of their store were cracking from the heat and the building was about to take fire, one of the plaintiffs' entered the building for the purpose of removing the books of the firm to a safer place, thinking that it would be better to remove them than to take the chances of their being destroyed by fire. He opened an iron safe in the store, in which they had been deposited for the night, which was called a fireproof safe, and took them therefrom, and to his residence, some distance away. The books consisted of a ledger, a cash book, a day book or blotter, and a small paper-covered book containing an inventory that the firm had taken of their stock on or about January 1st 1895. In the hurry and confusion incident to the removal of the books, the inventory was either left in the safe and was destroyed, or was otherwise lost, and could not be produced after the fire. The other books, however, were saved, and were exhibited to the insurer after the fire, and were subsequently produced as exhibits on the trial. There was neither plea nor proof that the loss of the inventory was due to fraud or bad faith on the part of plaintiffs, or either of them. The trial judge charged the jury that the set of books which had been kept and which were produced on the trial 'were substantially in compliance with the terms of the policy upon that subject,' and no exception was taken by the defendant to this part of the charge."

It was also said in the same opinion: "The books, though used at the trial as exhibits, do not form a part of the record. For these reasons no question arises as to the sufficiency of the set of books that was kept which we are called upon to consider. It must be taken for granted that it was a proper set of books, as the trial court held. The only substantial ground for complaint seems to be that the inventory was not produced."

The argument in behalf of the defendant assumes that the insurance company is entitled to a literal interpretation of the words of the policies. But the rules established for the construction of written instruments apply to contracts of insurance equally with other contracts. It was well said by Nelson, C. J., in *Turley* v. *North American Fire Insurance Co.*, 25 *Wend.* 373, 377, referring to a condition of the policy of insurance requiring the insured, if damage by fire was sustained, to produce a certificate under the hand and seal of the magistrate or notary public most contiguous to the place of the fire setting forth certain facts in regard to

the fire and the insured, that "this clause of the contract of insurance is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it for the purpose of guarding the company against fraud or imposition. Beyond this, we would be sacrificing substance to form—following words rather than ideas."

To the general rule there is an apparent exception in the case of contracts of insurance, namely, that where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company's attorneys, officers or agents prepared the policy, and it is its language that must be interpreted. *National Bank* v. *Insurance Co.*, 95 *U. S.* 673, 678-9; *Moulor* v. *American Life Ins. Co.*, 111 *U. S.* 335, 341.

Turning now to the words of the policies in suit, what is the better and more reasonable interpretation of those provisions so far as they relate to the issues in this case? The covenant and agreement "to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business," should not be interpreted to mean such books as would be kept by an expert bookkeeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly show, to a man of ordinary intelligence, "all purchases and sales, both for cash and credit." There is no reason to suppose that the books of the plaintiff did not meet such a requirement.

That of which the company most complains is that the insured did not produce the last inventory of their business, and removed the books and inventory from the fireproof safe in which they had been placed the night of the fire. It will be observed that the insured had the right to keep the books and inventory either in a fireproof safe or in some secure place not exposed to a fire that would destroy the house in which their business was conducted. But was it intended by the parties that the policy should become void unless the fireproof safe was one that was absolutely sufficient against every fire that might occur? We think not. If the safe was such as was commonly used, and such as, in the judgment of prudent men in the locality of the property insured, was sufficient, that was enough within the fair meaning of the words of the policy. It cannot be supposed that more was intended. If the company contemplated the use of a safe perfect in all respects and capable of withstanding any fire however extensive and fierce, it should have used words expressing that thought.

Nor do the words "or in some secure place not exposed to a fire which would destroy the house where such business is carried on" necessarily

mean that the place must be absolutely secure against any fire that would destroy such house. If, in selecting a place in which to keep their books and last inventory, the insured acted in good faith and with such care as prudent men ought to exercise under like circumstances, it could not be reasonably said that the terms of the policy relating to that matter were violated. Indeed, upon the facts stated, the plaintiffs were under a duty to the insurance company to remove their books and inventory from the iron safe, and thereby avoid the possibility of their being destroyed in the fire that was sweeping towards their store, provided the circumstances reasonably indicated that such a course on their part would more certainly protect the books and inventory from destruction than to allow them to remain in the safe. If they believed, from the circumstances, that the books and inventory would be destroyed by the fire if left in the safe, and, if, under such circumstances, they had not removed them to some other place and the books or inventory had been burned while in the safe, the company might well have claimed that the inability of the insured to produce the books and inventory was the result of design or negligence, and precluded any recovery upon the policies. We are of opinion that the failure to produce the books and inventory, referred to in the policy, means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence or design of the insured. Under any other interpretation of the policies, the insured could not recover if the books and inventory had been stolen, or if had been destroyed in some other manner than by fire, although they had been placed "in some secure place not exposed to a fire" that would reach the store. If the plaintiffs had the right, under the terms of the policy, as undoubtedly they had, to remove their books and inventory from the safe to some secure place not exposed to a fire which might destroy the building in which they carried on business, surely it was never contemplated that they should lose the benefit of the policies if, in so removing their books and inventory, they were lost or destroyed, they using such care on the occasion as a prudent man, acting in good faith, would exercise. A literal interpretation of the contracts of insurance might sustain a contrary view, but the law does not require such an interpretation. In so holding the court does not make for the parties a contract which they did not make for themselves. It only interprets the contract so as to do no violence to the words used and yet to meet the ends of justice.

We perceive no error in the view taken by the court below; and having noticed the only questions that need to be examined, its judgment is

Affirmed.